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Developments in Maryland Law, 1992-93

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I. CIVIL PROCEDURE

A. *The Appealability of an Order Compelling Arbitration*

In *Horsey v. Horsey*,[1] the Court of Appeals held that a trial court's order compelling arbitration was a final appealable judgment because it denied all relief sought and terminated the action.[2] In so holding, the court read the case law expansively and clarified the circumstances under which courts will consider orders compelling arbitration appealable as final judgments.[3]

1. The Case.—Leonilla and Elmer Horsey were married in 1954[4] and divorced on September 26, 1974.[5] Their divorce decree incorporated a separation agreement providing for spousal support.[6] One provision of the agreement required Mr. Horsey to pay Mrs. Horsey $350 per month for the first five years and $300 per month thereafter.[7] The agreement, mistakenly referring to these payments as "alimony,"[8] provided that the payments should be reduced if Mrs. Horsey obtained employment after eleven years.[9] If at that time the parties were unable to agree on a fair reduction, the agreement specified that

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1. 329 Md. 392, 620 A.2d 305 (1993).

2. *Id.* at 403, 620 A.2d at 311.

3. This Note will primarily discuss arbitration determinations under the Maryland Uniform Arbitration Act, 1965 Md. Laws 231, § 2 (effective June 1, 1965) (codified at MD. ANN. CODE art. 7, §§ 1-23 (1968) (subsequently revised and codified at MD. CODE ANN., CTS. & JUD. PROC. §§ 3-201 to -227 (1989))).

4. *See* Joint Record Extract at 42.

5. *Horsey*, 329 Md. at 396, 620 A.2d at 307.

6. *Id.* Because the separation agreement was executed prior to 1976, the current Code provisions regarding judicial modification of spousal support did not apply. *See* MD. CODE ANN., FAM. LAW §§ 8-103(b)&(c), 8-105(a)(1)&(2) (1991).

7. *Horsey*, 329 Md. at 395, 620 A.2d at 307. Mrs. Horsey had no income or resources of her own at the time of separation. *Id.*

8. Technical alimony is payable under a judicial decree and terminates upon (1) the death of either spouse, (2) the remarriage of the spouse receiving the payments, or (3) the reconciliation of the parties. *Id.* at 410, 620 A.2d at 314-15. While the agreement provided that Mr. Horsey's obligation to make payments would end upon Mrs. Horsey's death or remarriage, it did not indicate that the payments would terminate upon Mr. Horsey's death. Because the spousal support was not to end upon the death of Mr. Horsey, it constituted contractual spousal support rather than alimony. *Id.* at 411, 620 A.2d at 315; *see also* Goldberg v. Goldberg, 290 Md. 204, 207 n.2, 428 A.2d 469, 472 n.2 (1988); Mendelson v. Mendelson, 75 Md. App. 486, 501, 541 A.2d 1331, 1338 (1988).

9. *Horsey*, 329 Md. at 395, 620 A.2d at 307. The agreement provided:

> If at any time after eleven (11) years from the date of signing the agreement, the wife secures employment or receives income from any other source, the parties shall attempt to agree on a fair reduction in the alimony payments . . . . If on the matter of any reduction . . . in alimony payments the parties are unable to reach

they would submit the matter to arbitration.[10] No specific arbitration provisions were set forth in the agreement.[11]

Mr. Horsey made monthly payments until August 1988.[12] At that time he ceased making the payments, asserting that Mrs. Horsey had become employed and that she had breached the agreement by failing to notify him of that employment.[13] On January 12, 1989, Mr. Horsey filed a Petition of Contempt in the Circuit Court for Kent County alleging breach of the separation agreement.[14] After Mrs. Horsey responded with a complaint seeking specific performance of the agreement, Mr. Horsey asked the court to treat his petition as a counterclaim.[15] Neither party initiated arbitration or sought to compel arbitration prior to or during the court proceedings.[16] At trial, counsel for both parties stated that the arbitration provision had been waived.[17] Despite the parties' concessions, the trial court found that both parties had failed to comply with the agreement's prerequisites to obtaining judicial relief.[18] The trial court ordered the parties to attempt to negotiate a fair reduction in monthly payments and to submit the matter to arbitration if the negotiation failed.[19]

Mrs. Horsey appealed to the Court of Special Appeals, challenging the jurisdiction of the trial court to order arbitration and its failure to award her relief.[20] The court dismissed her appeal on the ground that the trial court had not rendered a final appealable judg-

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agreement, the matter shall be submitted to arbitration in accordance with the provisions hereinafter set forth.

Id.

10. *Id.*

11. *Id.*

12. *Id.* at 397, 620 A.2d at 308.

13. *Id.* at 396, 620 A.2d at 308. Mrs. Horsey was employed as a secretary for the Kent County Board of Education as of June 24, 1974. *Id.*, 620 A.2d at 307.

14. *Id.* at 397, 620 A.2d at 308.

15. *Id.* at 398, 620 A. 2d at 308.

16. *Id.*, 620 A.2d at 309.

17. *Id.*

18. Joint Record Extract at 150. The trial court stated:

[E]ach party has unilaterally interpreted the portions of [the provision] they find suitable to them, and both have failed to make a good faith effort to carry out the intent of their own Agreement. In such circumstances, both law . . . and equity, require the Court to compel them to fulfill the terms of their Agreement.

Id.

19. *Horsey*, 329 Md. at 400, 620 A.2d at 310. The trial judge may have believed his order was interlocutory and nonappealable. He wrote: "If they fail to agree within [90 days], the matter shall be submitted to [the arbitrator whose] decision shall constitute a binding determination of this Court on the parties, subject to appeal rights, as in all matters." Joint Record Extract at 151.

20. Brief of Appellant at 3.

ment.[21] Mrs. Horsey then petitioned for and obtained a writ of certiorari from the Court of Appeals.[22]

2. Legal Background.—

a. Maryland Uniform Arbitration Act.—In 1965, the General Assembly enacted the Maryland Uniform Arbitration Act (MUAA),[23] which substantially adopted the major provisions of the Uniform Arbitration Act (UAA).[24] In adopting the Act, the General Assembly repudiated the common law's hostility toward agreements to arbitrate[25] and embraced the modern trend toward recognizing and encouraging voluntary written agreements to arbitrate.[26] An order compelling arbitration was not included among the orders that were appealable under the MUAA,[27] and in 1972, the Court of Appeals determined in

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21. *Horsey*, 329 Md. at 401, 620 A.2d at 310. The intermediate court believed the trial court's order did not substantially determine the rights of the parties. Horsey v. Horsey, No. 90-1095, slip op. at 4 (Md. Ct. Spec. App. July 18, 1990) (per curiam), *rev'd*, 329 Md. 392, 620 A.2d 305 (1993); *see also* Cant v. Bartlett, 292 Md. 611, 616, 440 A.2d 388, 390 (1982) ("Finality for the purposes of appeal requires settlement of the rights of the parties."); Fred W. Allnutt, Inc. v. Commissioner of Labor & Indus., 289 Md. 35, 40, 421 A.2d 1360, 1363 (1980) ("In general, the cases hold that a judgment or order of a court is appealable if it is so final as to deny the appellant the means of further prosecuting or defending his rights and interests in the subject matter of the proceedings.").

22. *Horsey*, 329 Md. at 401, 620 A.2d at 310.

23. The Maryland Uniform Arbitration Act, 1965 Md. Laws 231, § 2 (effective June 1, 1965) (codified at MD. ANN. CODE art. 7, §§ 1-23 (1968) (subsequently revised and codified at MD. CODE ANN., CTS. & JUD. PROC., §§ 3-201 to -227 (1989))).

24. UNIF. ARBITRATION ACT (1955).

25. The promise to arbitrate a future dispute was revokable at common law. *See generally* Allegre v. Maryland Ins. Co., 6 H. & J. 408 (1825); James M. Mullen, *Arbitration Under Maryland Law*, 2 MD. L. REV. 326 (1938). In 1974, however, the Court of Special Appeals indicated that the common law doctrine had been abrogated by statute, Bel Pre Medical Ctr. v. Frederick Contractors, Inc., 21 Md. App. 307, 320, 320 A.2d 558, 565 (1974), *rev'd on other grounds*, 274 Md. 307, 334 A.2d 526 (1975), and in 1988, the Court of Appeals held that common law agreements to arbitrate future disputes were enforceable. Anne Arundel County v. Fraternal Order of Anne Arundel Detention Officers, 313 Md. 98, 110, 543 A.2d 841, 847 (1988).

26. Parties to disputes frequently favor arbitration over litigation for its relatively low cost, speed, relaxed rules of discovery and evidence, privacy, and when faced with complex issues, arbitrator expertise. The judicial system frequently favors arbitration as well. *See* 67 MARYLAND STATE BAR ASS'N TRANSACTIONS 251 (1962) (stating that "the arbitral process combines finality of decision with speed, moderate expense and flexibility . . . in solving a problem"); *see also Bel Pre Medical Ctr.*, 21 Md. App. at 320, 320 A.2d at 565 (stating that, because the "prime purpose of [the Act] is to discourage litigation and to foster voluntary resolution of disputes," suits to compel arbitration are to be viewed as "favored" actions).

27. *See* MD. ANN. CODE art. 7, § 18 (1968). It stated:

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under Section 2;

Maietta v. Greenfield[28] that an order compelling arbitration was a nonappealable, interlocutory judgment.[29]

In *Maietta*, the court considered a subcontractor's appeal from an order of the circuit court compelling arbitration to resolve a contract dispute with a general contractor.[30] Affirming the chancellor's finding that there was a contract to arbitrate, the court held that, even if the chancellor had erred in his determination, the order to arbitrate was a nonappealable, interlocutory order.[31] Examining the legislative intent associated with the enactment of the MUAA, the court inferred that the General Assembly limited the categories of appealable orders to encourage arbitration.[32]

As part of the adoption of the Courts and Judicial Proceedings Article in 1973,[33] Article 7 of the MUAA, which listed the appealable orders,[34] was repealed *in toto* and replaced with sections 3-201 to -234.[35] Because the MUAA as reenacted does not contain a list of appealable orders, appeals from orders concerning arbitrability determi-

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(2) An order granting an application to stay arbitration made under Section 2(b);
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A judgment or decree entered pursuant to the provisions of this article.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

Id. With the appropriate substitution of "article" for the UAA's reference to the "act" at § 19(a)(6), the MUAA repeated verbatim the UAA text. *See* UNIF. ARBITRATION ACT § 19(a)(6) (1955).

28. 267 Md. 287, 297 A.2d 244 (1972).

29. *Id.* at 293, 297 A.2d at 247-48.

30. *Id.* at 288-89, 297 A.2d at 245-46.

31. *Id.* at 293, 297 A.2d at 247-48; *cf.* MD. ANN. CODE art. 7, § 18 (1968).

32. *Maietta*, 267 Md. at 291, 297 A.2d at 246. The court referred to Arizona and California, two states that had adopted a statute similar to the UAA. The courts in those states held that an order compelling arbitration was an interlocutory, nonappealable order. *Id.* at 292-93, 297 A.2d at 247 (citations omitted). The *Maietta* court agreed that the appeal of an interlocutory order must await the final judgment of a court confirming or denying the arbitrator's award. *See id.* at 293, 297 A.2d at 247. Quoting the California court with approval, the court stated that "'*if at the very threshold of the proceeding the defaulting party could appeal and thereby indefinitely delay the matter of arbitration, the object of the law and the purpose of the written agreement would be entirely defeated.*'" *Id.* (quoting Jardine, Matheson & Co., Ltd. v. Pacific Orient Co., 280 P. 697, 698 (Cal. Ct. App. 1929)).

33. *See* Acts of the 1st Special Session of 1973, ch. 2, § 1 (codified at MD. CODE ANN., CTS. & JUD. PROC. (1974)). *See generally* William H. Adkins, *Code Revision in Maryland: The Courts and Judicial Proceedings Article*, 34 MD. L. REV. 7 (1974) (providing an examination and analysis of the provisions of the Courts and Judicial Proceedings Article on a title-by-title basis).

34. *See supra* note 27.

35. MD. CODE ANN., CTS. & JUD. PROC. §§ 2-201 to -234 (1974).

nations are governed by section 12-301[36] or 12-303,[37] which govern appeals from final judgments and interlocutory orders.[38]

In *Litton Bionetics, Inc. v. Glen Construction Co.*,[39] the court first applied the applicable provisions of the new Code. A building owner sought a declaratory judgment that the arbitration of a dispute between himself and an architect be consolidated with another arbitration proceeding he was undergoing with a general contractor.[40] The trial court denied the petition and the owner appealed.[41] Noting that the MUAA did not expressly deny the right to appeal a final judgment, the Court of Appeals determined that the sole question was

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36. Section 12-301 states in part:

> Except as provided in § 12-302, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended.

MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (1974).

37. Section 12-303 stated in relevant part:

> A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:
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> . . . .
>
> (c) An order:
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> . . . .
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> (9) Granting an application to stay arbitration pursuant to § 3-207 of this article.

MD. CODE ANN., CTS. & JUD. PROC. § 12-303 (1974). The most recent revision of section 12-303 retains this interlocutory appeal provision from an order granting a stay of arbitration. *See* MD. CODE ANN., CTS. & JUD. PROC. § 12-303(3)(ix) (1989).

38. Prior to 1974, the common law did not allow the appeal of a final judgment made by a court in the exercise of its special or limited jurisdiction, unless expressly granted by statute. *See, e.g.*, Simpler v. State *ex. rel.* Boyd, 223 Md. 456, 460-61, 165 A.2d 464, 466 (1960). The Revisor's Note explained the change in the law governing appeals, making explicit reference to Article 7, § 18:

> No change is intended in the general rules as to appealability, with one exception. That exception is contained in the second sentence [of section 12-301], permitting an appeal from a decision made in the exercise of original special, limited, statutory jurisdiction.
>
> The present case law is to the contrary . . . [and] constitutes something of a trap . . . . When legislators create [special] jurisdiction, they often may not realize that no appeal will be permitted.
>
> . . . It seems more reasonable to let the broad general language include appeals in such cases unless the legislature expressly decides to deny them. This approach will eliminate the necessity of deciding whether a given jurisdiction is common law or special, limited and statutory . . . . It will also permit the repeal of numerous special appeal provisions, such as Article 7, § 18 . . . .

Revisor's Note to MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (1974).

39. 292 Md. 34, 437 A.2d 208 (1981).

40. *Id.* at 39, 437 A.2d at 211.

41. *Id.*

whether the order was a final judgment for the purposes of appeal.[42] Because the order "denied all relief" and "completely terminated the action" in the trial court, the court held that the trial court's order dismissing the petition to consolidate arbitration proceedings was a final appealable judgment.[43]

b. Federal Arbitration Act.—In 1988, Congress amended the Federal Arbitration Act (FAA).[44] It added section 16 to the Act to provide statutory control of appeals of arbitrability determinations.[45] Although this section takes a decidedly proarbitration stance,[46] section 16(a)(3) does permit an appeal "from a final decision with respect to an arbitration that is subject to [the] title."[47] In construing the meaning of "final" as used in this section, the Supreme Court has provided the following definition: "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judg-

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42. *Id.* at 42, 437 A.2d at 212.

43. *Id.*

44. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (Law. Co-op. 1988 & Supp. IV 1993). The Federal Arbitration Act (FAA) governs arbitration agreements in contracts involving interstate commerce. *See id.*

45. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1019(a), 102 Stat. 4670 (1988) (codified as amended at 9 U.S.C. § 16 (Supp. IV 1989)). The FAA provides:

§ 16. Appeals

(a) An appeal may be taken from—
  (1) an order—
    (A) refusing a stay of any action under section 3 of this title,
    (B) denying a petition under section 4 of this title to order arbitration to proceed,
    (C) denying an application under section 206 of this title to compel arbitration,
    (D) confirming or denying confirmation of an award or partial award, or
    (E) modifying, correcting, or vacating an award;
  (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
  (3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
  (1) granting a stay of any action under section 3 of this title;
  (2) directing arbitration to proceed under section 4 of this title;
  (3) compelling arbitration under section 206 of this title; or
  (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (Supp. IV 1989).

46. Section 16 permits immediate appeal from an interlocutory order that does not favor arbitration, but does not permit an immediate appeal if the order favors arbitration. *See supra* note 45.

47. 9 U.S.C. § 16(a)(3).

ment."[48] In cases where the only issue before the district court was whether a dispute was subject to arbitration, the Courts of Appeals for the Fourth, Sixth, and Seventh Circuits have held that an order compelling arbitration is a final appealable judgment.[49] In "embedded" proceedings—where a party seeks some relief other than an order compelling or prohibiting arbitration—the Courts of Appeals for the Second, Fourth, Fifth, and Seventh Circuits have dismissed appeals from orders compelling arbitration for lack of a final appealable judgment.[50]

c. Other States.—The determination of whether an order compelling arbitration is a final appealable judgment depends, in great measure, upon a court's understanding of "final." The finality of court orders for purposes of appeal is defined by common law, statute, or rules of practice. If an order compelling arbitration satisfies a state's definition of final, an appeal may be taken.[51] Because courts differ in the meaning of "final," and even where they substantially

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48. Catlin v. United States, 324 U.S. 229, 233 (1945); *cf.* 28 U.S.C. § 1291 ("The courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

49. *See* S+L+H S.p.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1522 (7th Cir. 1993) (holding that an order granting arbitration is final when arbitration is the only claim for relief); Delta Financial Corp. v. Paul D. Comanduras & Assocs., 973 F.2d 301, 305 (4th Cir. 1992) (holding that, where a plaintiff's sole claim was an order to compel arbitration, the trial court's order to compel arbitration was a final appealable order); Drexel Burnham Lambert, Inc. v. Mancino, No. 91-3213, 1991 WL 270809, at *1 (6th Cir. Dec. 19, 1991) (holding that, because plaintiffs sued for the specific remedy of an order compelling arbitration, the trial court reached a final appealable decision); Stedor Enter., Ltd. v. Armtex, Inc., 947 F.2d 727, 731 (4th Cir. 1991) (holding that, in a proceeding where the sole issue was the arbitrability of the dispute, the trial court's order compelling arbitration was a final appealable decision).

50. Usually, the party seeks some relief that reaches the merits of the allegedly arbitrable dispute. *Compare* the cases at *supra* note 49 *with* Humphrey v. Prudential Securities, Inc., 4 F.3d 313, 318-19 (4th Cir. 1993) (concluding that an order compelling arbitration in an embedded action is appealable neither as a final judgment nor as an interlocutory order); Filanto, S.p.A. v. Chilewich Int'l Corp., 984 F.2d 58, 60 (2d Cir. 1993) (holding that an order compelling arbitration in an embedded action is not immediately appealable); West of England Ship Owners Mut. Ins. Ass'n v. American Marine Corp., 981 F.2d 749, 751 (5th Cir. 1993) (holding that, where an independent action to compel arbitration was consolidated with other actions, orders compelling arbitration and staying litigation were interlocutory and not final); McDermott Int'l v. Underwriters at Lloyds, 981 F.2d 744, 745 (5th Cir.) (holding that, where a case includes other claims for relief, an order compelling arbitration does not end litigation on the merits, but is only interlocutory), *cert. denied,* 113 S. Ct. 2442 (1993); Perera v. Siegel Trading Co., 951 F.2d 780, 786 (7th Cir. 1992) (holding that an arbitration order in an embedded proceeding "in no way resolves the merits of the claims" and is an unappealable interlocutory decision).

51. Where an appeal is denied, the party objecting to the order frequently must await the trial court's confirmation of the arbitration award. *See* Maietta v. Greenfeld, 267 Md. 287, 293-94, 297 A.2d 244, 247-48 (1972) (stating that the order directing the parties to

agree, differ in their application of the term, the relevant case law varies widely.

State courts have employed varying criteria to determine whether an order compelling arbitration is a final appealable judgment. Courts have relied in whole or in part upon whether the order (1) terminated a separate and distinct proceeding,[52] (2) terminated a special proceeding,[53] (3) passed on the merits of the case,[54] (4) granted the sole relief sought in the action,[55] (5) affected a substantial right and, in effect, determined the action,[56] or (6) virtually put the party

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arbitrate can be appealed after the chancellor confirms or denies the arbitrator's decision).

52. *See, e.g.*, Dewart v. Northeastern Gas Transmission Co., 95 A.2d 381 (Conn. 1953) ("One of the tests to determine whether an order is final so as to permit an appeal is to ascertain whether it terminates a separate and distinct proceeding."); Daginella v. Foremost Ins. Co., 495 A.2d 709, 712 (Conn. 1985) (holding that a court order directing parties to proceed to arbitration was not a separate and distinct proceeding and was therefore not appealable); Harris v. State Farm Mut. Auto. Ins. Co., 283 So. 2d 147, 149 (Fla. Dist. Ct. App. 1973) (concluding that the order "did not finally terminate the action or any part thereof").

53. *See, e.g.*, Jardine, Matheson & Co. v. Pacific Orient Co., 280 P. 697, 699 (Cal. Ct. App. 1929) (holding that the trial court's order did not fall within the scope of the Civil Procedure Code's section authorizing appeal from a final order in a "special proceeding of a civil nature"); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Griesenbeck, 234 N.E.2d 456, 457 (N.Y. 1967) (holding that an order directing arbitration was a final order in a special proceeding and was appealable); Hosiery Mfrs. Corp. v. Goldston, 143 N.E. 779 (N.Y. 1924) (finding that an order requiring parties to proceed to arbitrate under an arbitration agreement represents the end of one special proceeding and that such an order is a final judgment); Marchant v. Mead-Morrison Mfg. Co., 169 N.E. 386, 388 (N.Y. 1929) (holding that an order to arbitrate a controversy is one that finally determines a special proceeding and, because it is not part of arbitration, is subject to direct review), *appeal dismissed*, 282 U.S. 808 (1930); *In re* Application of Nationwide Mut. Ins. Co., 241 N.Y.S.2d 589, 597 (N.Y. Sup. Ct. 1963) (recognizing that an order denying a motion for a stay of arbitration was appealable under a civil practice rule that stated, in part, that arbitration is a "special proceeding").

54. *See, e.g.*, Anthony v. Kualoa Ranch, Inc., 736 P.2d 55, 59 (Haw. 1987) (holding an order was final because it assumed arbitration would result in payment of money by lessors to lessees and provided criminal sanctions if lessors failed to make payments); Cajun Elec. Power Co. v. Louisiana Power & Light Co., 334 So. 2d 554, 555 (La. Ct. App. 1976) (applying a Louisiana statute that renders a judgment that determines the merits in whole or in part a "final judgment"); Bellaire City Schs. Bd. of Educ. v. Paxton, 391 N.E.2d 1021, 1025 (Ohio 1979) (remarking that all of the issues had not been disposed of before the trial court); Citizens Nat'l Bank v. Callaway, 597 S.W.2d 465, 466 (Tex. Civ. App. 1980) (holding that the order did not dispose of all the issues and was only the first step in the ultimate disposition of the dispute).

55. *See* Machine Prods. Co. v. Prairie Local Lodge, 94 So. 2d 344, 346 (Miss. 1957) (finding that the decree "partook of the nature of a final decree," since once arbitration was accomplished, all of the relief prayed for would have been granted).

56. *See, e.g.*, *Daginella*, 495 A.2d at 713 (holding that a court order directing parties to proceed to arbitration did not determine the rights of the parties and therefore was not appealable); School Comm. of Agawam v. Agawam Educ. Ass'n, 359 N.E.2d 956, 957 (Mass. 1977) (stating that the denial of a request to stay arbitration was not an act finally adjudi-

out of court.[57] Other courts have frequently relied upon a state statute or rule of practice as a major factor in determining appealability as a final judgment.[58]

3. The Court's Reasoning.—In *Horsey*, the Court of Appeals held that an order compelling arbitration, which denied all of the relief sought and terminated the action in the trial court, was a final appealable judgment.[59] The court supported its holding by pointing to Maryland case law declaring trial court orders to be final appealable judgments when they effectively put the plaintiffs out of court.[60] Em-

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cating the parties' rights and that final adjudication would occur when the court acted after the arbitration proceeding had ended); *In re* Application of Nationwide Mut. Ins. Co., 241 N.Y.S.2d at 597 (recognizing that an order denying a motion for a stay of arbitration was appealable under a civil practice rule that stated, in part, that an appeal may be taken from an order affecting a substantial right, made in a special proceeding); Systems Constr., Inc. v. Worthington Forest, Ltd., 345 N.E.2d 428, 430 (Ohio Ct. App. 1975) (holding that an order to arbitrate is a final appealable order because "it in effect determines the action and prevents a judgment"); Wagner v. Columbia Hosp. Dist., 485 P.2d 421, 427-28 (Or. 1971) (holding that an order under an Oregon statute stating that an order affecting a substantial right, and in effect determining the action so as to prevent a judgment in plaintiff's favor, would be deemed to be a "judgment" for the purpose of appeal); State Dep't of Human Resources v. Williams, 505 P.2d 936, 938-39 (Or. Ct. App. 1973) (finding that an order that affects a "substantial right" and "in effect determines the action or suit so as to prevent a judgment or decree" is appealable under an Oregon statute).

57. *See, e.g.*, Milberry v. Board of Educ., 354 A.2d 559, 561 n.1 (Pa. 1976) (holding an order that compelled a grievance to be submitted to arbitration, but retained the case on the docket until arbitration was complete, was a final order because it virtually put the party out of court in the action it sought to litigate); Board of Educ. v. Philadelphia Fed'n of Teachers, 346 A.2d 35, 37 n.2 (Pa. 1975) (holding an order that directed arbitration, but did not dismiss the complaint, was a final order because it terminated the action between the parties and virtually put the party out of court in the action it sought to litigate).

58. *See* Bethke v. Polyco, Inc., 730 S.W.2d 431, 434 (Tex. Ct. App. 1987) (holding that an order was not appealable when no statute or rule authorized appeal); *cf.* Brennan v. General Accident Fire & Life Assurance Corp., 453 A.2d 356, 357 (Pa. Super. Ct.) (holding that an order directing arbitration pursuant to a common-law arbitration agreement is not appealable, although arbitration agreements under the Pennsylvania Arbitration Act are appealable by statute), *rev'd on other grounds*, 574 A.2d 580 (Pa. 1982).

59. *Horsey*, 329 Md. at 403, 620 A.2d at 311.

60. *Id.* at 401, 620 A.2d at 310; *see* Wilde v. Swanson, 314 Md. 80, 85, 548 A.2d 837, 839 (1988) (holding that an order of a circuit court dismissing a plaintiff's complaint for lack of venue may be "a final judgment without an adjudication . . . on the merits"); Doehring v. Wagner, 311 Md. 272, 275, 533 A.2d 1300, 1301-02 (1987) (finding that an unqualified ruling of the trial court that "put the plaintiffs out of court, denying them the means of further prosecuting the matter," was a final appealable judgment); Walbert v. Walbert, 310 Md. 657, 661, 531 A.2d 291, 293 (1987) (holding that an order that denied plaintiff "the means of further prosecuting the case at the trial level" was a final appealable order); Houghton v. County Comm'rs of Kent County, 307 Md. 216, 221, 513 A.2d 291, 293 (1986) ("[A]n order granting a motion to dismiss or strike the plaintiff's entire initial pleading is final and appealable."); Houghton v. County Comm'rs of Kent County, 305 Md. 407, 412, 504 A.2d 1145, 1148 (1986) ("[A]n unqualified order granting a motion to dismiss or strike the plaintiff's initial pleading, thereby having the effect of putting the parties out of court,

phasizing its decision in *Litton Bionetics*,[61] the court repeated two key phrases from its opinion: an order compelling arbitration is a final appealable judgment when it has "denied all of the relief sought" and has "completely terminated the action" in the trial court.[62] The court concluded that, because the trial court's order dismissed Mr. Horsey's Petition of Contempt/counterclaim and directed Mr. and Mrs. Horsey to submit their dispute to arbitration, the order terminated the matter before the trial court, and thus, was a final appealable judgment.[63]

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is a final appealable order."); Concannon v. State Roads Comm'n, 230 Md. 118, 125, 186 A.2d 220, 224-25 (1962) (stating that an order that determines the principal claim of the plaintiffs and deprives them of the means to enforce the right that they assert is a final appealable order).

61. *See supra* notes 39-43 and accompanying text.

62. *Horsey*, 329 Md. at 403, 620 A.2d at 311 (quoting Litton Bionetics, Inc. v. Glen Constr. Co., 292 Md. 34, 42, 437 A.2d 208, 212 (1981)). The *Horsey* court also cited numerous cases in which a trial court order, "terminating the action in that court and remanding the parties to another tribunal for resolution of their dispute, [was] final and appealable." *Id.* at 404, 620 A.2d at 311; *see Wilde*, 314 Md. at 86-87, 548 A.2d at 840 (holding that the dismissal of a negligence action for lack of venue is a final appealable judgment); Carroll v. Housing Opportunities Comm'n, 306 Md. 515, 520, 510 A.2d 540, 542 (1986) (holding that a circuit court's order denying a tenant's demand for a jury trial and remanding the case to district court was a final appealable judgment); Eastern Stainless Steel v. Nicholson, 306 Md. 492, 501, 510 A.2d 248, 252 (1986) (holding that a circuit court's remand to the Workers' Compensation Commission as required by statute is a final appealable judgment); Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., 296 Md. 46, 59 n.8, 459 A.2d 205, 213 n.8 (1983) (holding that the order of an administrative agency's appeal board, remanding the case to a hearing officer, was not a final appealable judgment because the order neither determined the rights of the parties nor terminated the administrative proceeding); Brown v. Baer, 291 Md. 377, 385, 435 A.2d 96, 100 (1981) (holding that an order of the circuit court remanding the case to the county liquor board was a final appealable judgment); Schultz v. Pritts, 291 Md. 1, 6, 432 A.2d 1319, 1323 (1981) (holding that a circuit court's order remanding the proceeding to the board of zoning appeals was a final appealable order); Department of Pub. Safety v. LeVan, 288 Md. 533, 544, 419 A.2d 1052, 1057 (1980) (holding that an order of a circuit court, acting as an appellate court for an administrative appeal, that remands the case to an administrative agency, is a final appealable judgment).

63. *See Horsey*, 329 Md. at 405-06, 620 A.2d at 312. The court declared that its holding was in agreement with other decisions determining that "a trial court's order, terminating the action in that court and remanding the parties to another tribunal for resolution of their dispute, is final and appealable." *Id.* at 403-04, 620 A.2d at 311. The court concluded by citing federal and other state courts, acting under similar statutory provisions, that have held that an order compelling arbitration was a final appealable judgment. *Id.* at 404-05, 620 A.2d at 312. Of the seven federal cases cited, only one occurred after the 1988 addition of § 16 to the FAA. *See supra* note 45. In International Union, United Auto., Aerospace & Agric. Implement Workers v. United Screw & Bolt Corp., 941 F.2d 466, 472 (6th Cir. 1991), the Sixth Circuit based its decision upon Goodall-Sanford v. United Textile Workers of Am., 353 U.S. 550 (1957), which held that, because the right to arbitration enforced under the Labor Management Relations Act, 29 U.S.C. § 185(a), was "not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought," the court's decree was a final appealable judgment under 28 U.S.C. § 1291. *Id.* at 551. Compare *Goodall-Sanford* with cases at *supra* note 49.

Two other aspects of the decision, while not holdings of first impression, also merit attention. First, the court affirmed its holding in *NSC Contractors v. Borders*,[64] declaring that, when neither party has invoked its right to arbitration and instead has sought to resolve an arbitrable matter through litigation, the right to arbitrate those matters is waived.[65] Second, the court stressed that spousal support required by an agreement is not alimony when it does not terminate upon the death of the supporting spouse or, alternatively, is not subject to judicial modification.[66]

4. Analysis.—In *Horsey*, the Court of Appeals attempted to resolve the ambiguity left by the 1974 revision of the Code regarding the appealability of certain arbitrability determinations. In *Litton Bionetics*, the court recognized that the purpose of the revision, which deleted the Article 7, section 18 provisions limiting the appeal of arbitration determinations,[67] was to eliminate "the rule requiring express statutory authorization for appeals from judgments entered in actions where the court was exercising a special statutory jurisdiction."[68] While the revision did not change the law as to the appealability of final judgments, it did eliminate the MUAA's statutory exceptions to the final judgment rule. Thus, although appeal from an interlocutory order staying arbitration was preserved,[69] the revision eliminated the statutory distinction between orders compelling arbitration and or-

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64. 317 Md. 394, 564 A.2d 408 (1989).

65. *Horsey*, 329 Md. at 406, 620 A.2d at 313; *see NSC Contractors*, 317 Md. at 402, 564 A.2d at 412; *see also* Charles J. Frank, Inc. v. Associated Jewish Charities, 294 Md. 443, 448, 450 A.2d 1304, 1306 (1982).

66. *Horsey*, 329 Md. at 417, 620 A.2d at 318. Citing the provisions of the separation agreement, case law holding that trial courts lack the authority to modify payments of pre-1976 spousal support agreements, and the unenforceable "agreement to agree" that remained as a result of the waiver of arbitration, the court declined to use its equitable powers to modify the agreement and enforce specific performance. *See id.* at 420, 620 A.2d at 319. Judge McAuliffe, however, believed the court could modify the agreement under contract law. He wrote:

> [A]lthough the provision for spousal support was not technical alimony and therefore could not be adjusted by a chancellor in the exercise of equitable powers, the parties intended to provide for modification under the same criteria that would be used if it were technical alimony, with the single exception that the adjustment, if indeed any was required by the changed circumstances, could only be downward. These are the criteria that an arbitrator would have applied, and if arbitration were waived would guide a court.

Id. at 423, 620 A.2d at 321 (McAuliffe, J., concurring in part and dissenting in part).

67. *See supra* notes 33-38 and accompanying text.

68. Litton Bionetics, Inc. v. Glen Constr. Co., 292 Md. 34, 41, 437 A.2d 208, 212 (1981); *see also supra* notes 36-38.

69. *See* MD. CODE ANN., CTS. & JUD. PROC. § 12-303(c)(9) (1974).

ders denying arbitration.[70] This distinction—found in the UAA and in the 1988 revision of the FAA—reflected the principle that arbitration was to be a favored means of dispute resolution.[71] By eliminating the section 18 provisions, the General Assembly inadvertently undermined a significant principle that had guided the appealability of prior arbitrability determinations. The *Horsey* court had little choice but to resolve this unintentional ambiguity by referring to the law governing appeals of final judgments. Nevertheless, by failing to address the former statutory distinction, the *Horsey* court did not do justice to prior Maryland case law and neglected the opportunity to analyze the policy judgments that underlie the final judgment rule and the MUAA's role as a favored means of dispute resolution.

Until *Horsey*, Maryland appellate courts had not directly considered the appealability under the revised Code of an order compelling arbitration as a final judgment.[72] Thus, although the *Horsey* opinion suggests otherwise, the case did in effect present an issue of first impression. Furthermore, *Litton Bionetics* did not, as the court indicated in *Horsey*, require the court's expansive holding.[73] The *Litton Bionetics* court merely held that the dismissal of a petition seeking to consoli-

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70. *See supra* notes 27, 36.

71. *See supra* notes 26, 32, 44-47 and accompanying text.

72. In Anne Arundel County v. Fraternal Order of Anne Arundel Detention Officers, 313 Md. 98, 543 A.2d 841 (1988), the Court of Appeals considered the appeal of an order compelling arbitration with a union, but it did not consider the question of the order's appealability as a final judgment. Unlike *Horsey*, the only issue before the circuit court in *Anne Arundel Detention Officers* was whether the dispute was subject to arbitration. *See id.* at 100, 543 A.2d at 842. In addition, because the collective bargaining agreement between the county and the union did not expressly state that the MUAA applied, the arbitration provision only could be enforced as a matter of common law. *Id.* at 104-05, 543 A.2d at 844; *cf.* MD. CODE ANN., CTS. & JUD. PROC. § 3-206(b). Finding that the refusal to enforce arbitration agreements in the absence of express statutory provisions was no longer tenable, the court held that "agreements to arbitrate future disputes are generally valid and enforceable under Maryland common law." *Anne Arundel Detention Officers*, 313 Md. at 110, 543 A.2d at 847; *see also* District Moving & Storage Co. v. Gardiner & Gardiner, Inc., 63 Md. App. 96, 492 A.2d 319 (1985) (considering the appeal of an order staying the claims of the plaintiff and ordering arbitration), *aff'd*, 306 Md. 286, 508 A.2d 487 (1986).

The remaining appellate court decisions after *Litton Bionetics* most frequently have concerned the appealability of orders denying or dismissing petitions that sought to compel arbitration. *See* Regina Constr. Corp. v. Envirmech Contracting Corp., 80 Md. App. 662, 672, 565 A.2d 693, 698 (1989) (holding that an order denying a motion to dismiss a subcontractor's suit against a general contractor—the functional equivalent of an order denying a motion to compel arbitration—was appealable as a final judgment or a collateral order); McCormick Constr. Co. v. 9690 Deerco Rd. Ltd. Partnership, 79 Md. App. 177, 182, 556 A.2d 292, 295 (1988) (holding that an order staying a mechanic's lien action, requiring arbitration, and retaining jurisdiction was not appealable as a final judgment or as an interlocutory order).

73. *See Horsey*, 329 Md. at 403-04, 620 A.2d at 310-11.

date two arbitration proceedings was a final appealable order.[74] A legitimate reading of the decision could infer that the holding was limited to consolidation determinations or, alternatively, that some distinction remained between orders compelling and denying arbitration. Moreover, while it might be clearer that an order dismissing a petition to consolidate arbitration denies all relief and terminates the action,[75] it is not so obvious that an order compelling arbitration does the same.[76] The former denies all benefits of arbitration and ends the action; the latter provides the bargained-for relief and, at worst, merely postpones litigation.

In addition, in the cases cited by the *Horsey* court, a trial court's order was deemed a final appealable judgment when it effectively put the plaintiff out of court.[77] In *Horsey*, Mr. Horsey, who initiated the action, became the defendant due to some procedural maneuvering.[78] From a strictly formalistic perspective, the trial court's order did not dismiss the complaint of the plaintiff, Mrs. Horsey, but rather the counterclaim of the defendant, Mr. Horsey. The court declined to adopt this formalistic approach, however, and treated Mr. Horsey's Petition for Contempt as the underlying cause of action that was dismissed by the trial court.[79] Still, while the court characterized Mr. Horsey as having been denied the relief sought, Mrs. Horsey actually appealed.[80]

In the absence of any statutory provisions governing the appealability of such an arbitrability determination, the Court of Appeals determined appealability under the final judgment rule.[81] One approach that the court did not discuss would have been to deem a final arbitration award alone to be a final appealable judgment.[82] Thus, until an arbitrator made an award, an order compelling arbitra-

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74. Litton Bionetics, Inc. v. Glen Constr. Co., 292 Md. 34, 42, 437 A.2d 208, 212 (1981).

75. *See supra* text accompanying notes 39-43.

76. *See infra* text accompanying notes 82-84 (discussing the benefits of delaying the appeal of an order compelling arbitration until confirmation or denial of an arbitrator's award); *cf. supra* text accompanying notes 44-50 (describing the approach of the FAA).

77. *See supra* note 60.

78. *See supra* text accompanying notes 14-15.

79. *See Horsey*, 329 Md. at 406, 620 A.2d at 312.

80. *See supra* text accompanying note 20. In her brief, Mrs. Horsey claimed that the trial court's order "awarded none of the relief prayed . . . and left her with no means of further pursuing her claim." Brief of Appellant at 28. Mr. Horsey, on the other hand, stated that the order "merely enforce[d] the modification provisions agreed to by the parties." Brief of Appellee at 24.

81. *See supra* note 36.

82. Adopting this approach would have produced the same practical result as the holding in *Maietta*. *See* Marietta v. Greenfield, 267 Md. 287, 293, 297 A.2d 244, 247 (1972) (holding that an order to arbitrate is a nonappealable interlocutory order).

tion would be considered interlocutory. After an award, a dissatisfied party would then be able to attack the earlier arbitrability determination.[83] Arguably, this approach would not have violated the final judgment rule and would have more correctly implemented the legislative intent to favor arbitration over litigation.[84] Instead, the court simply chose to look to the case law governing the final appealability of judicial orders and decrees.[85] By adopting this stance, the court opted to resolve the tension between the policies underlying arbitration and the final judgment rule in favor of the latter. Unfortunately, it did so without any discussion of the merits of extending the final judgment rule to orders compelling arbitration. Presumably, despite the favored status of arbitration in the law, the court felt it could not ignore the clear language of the statute governing the final appeal of judgments to create an exception for orders compelling arbitration.

Horsey highlighted those circumstances under which a court order will be considered a final appealable order. Whenever an order effectively ends the action before the court, puts the parties out of court, and leaves nothing to be done but to enter the judgment, the order will be deemed final.[86] Despite these instructions, however, it may be difficult at times to determine whether a trial court's order is interlocutory or a final judgment.[87] Even if the trial court characterizes the order as interlocutory, it may be final in the eyes of the Court

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83. This approach preserves the possibility of reaching an amicable resolution, promotes speedy resolution of disputes at reduced expense, and removes cases from crowded dockets. Even if the trial court errs in ordering arbitration, the process still yields benefits. A party can appeal the arbitrator's award and the arbitration process itself prepares both parties for trial. Finally, this rule is easier to apply than the rule applied by the Court of Appeals. The court simply looks to whether an arbitrator's award has been made. This option is still available to dissatisfied parties who petition the court under MD. CODE ANN., CTS. & JUD. PROC. § 3-224. *See* Messersmith, Inc. v. Barclay Townhouse Assocs., 313 Md. 652, 657, 547 A.2d 1048, 1050 (1988) (allowing an appellant, after challenging the arbitration panel's jurisdiction, participating in arbitration, and receiving an arbitration award, to petition the circuit court to vacate the award on the grounds that there was no agreement to arbitrate).

On the other hand, some considerations support recognition of the order as a final appealable judgment. It permits the appellate court to make the arbitrability determination speedily and efficiently before proceeding to arbitration on the merits and prevents a useless and costly arbitration proceeding if the order before it is reversed on appeal after an arbitrator's award.

84. *See Marietta*, 267 Md. at 291, 297 A.2d at 246.

85. *See supra* note 60 and accompanying text.

86. *See Horsey*, 329 Md. at 401, 620 A.2d at 310.

87. *See supra* notes 19, 21. In addition, an order, on occasion, may be neither interlocutory nor final. *See* McCormick Constr. Co. v. 9690 Deerco Rd. Ltd. Partnership, 79 Md. App. 177, 556 A.2d 292 (1989) (holding that an order staying a mechanic's lien action, requiring arbitration, and retaining jurisdiction was not appealable as a final judgment or an interlocutory order).

of Appeals.[88] Moreover, determining whether an order is interlocutory or final is critical, because if a party waits until an arbitration award to appeal and has judged incorrectly, the failure to appeal the order in a timely fashion will be deemed a waiver.[89] Attempting to raise the issue on appeal from an arbitration award will be considered an impermissible collateral attack on a final judgment.[90]

5. Conclusion.—Because agreements to arbitrate future disputes are common in many types of contracts, the *Horsey* decision provided guidance to Maryland courts and practitioners in many different areas of the law. When an order compelling arbitration denies all relief sought and completely terminates the action in that court, it is a final appealable judgment. It remains to be seen whether the practical effects of this decision will undermine the MUAA's purpose to encourage arbitration over litigation. If it does, the legislature may consider adding statutory appeal provisions to the MUAA to restore arbitration to a favored status in the law.

JAMES M. CONNOLLY

B. Exercising Jurisdiction over the District of Columbia

In *Hansford v. District of Columbia*,[1] the Court of Appeals held that a Maryland circuit court could exercise jurisdiction over the District of Columbia when the District was sued for alleged negligent activities on a federal enclave located within Maryland.[2] The court determined that the cession of exclusive jurisdiction by the State of Maryland to the federal government in no way restricted the ability of Maryland courts to exercise jurisdiction over disputes arising on federal enclaves inside the state.[3]

The court also found that Maryland had rejected the common law rule of venue that required that municipal corporations be sued in their own courts.[4] The court concluded that the General Assembly intended the current general venue statute to apply to municipal cor-

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88. *See supra* notes 19-21.

89. *See Horsey*, 329 Md. at 406, 620 A.2d at 313.

90. *See id.*; *see also* Houghton v. County Comm'rs of Kent County, 305 Md. 407, 504 A.2d 1145 (1986) (applying this rule harshly to parties who erred in judging the time of finality).

1. 329 Md. 112, 617 A.2d 1057, *cert. denied*, 113 S. Ct. 2997 (1993).

2. *Id.* at 129-30, 617 A.2d at 1065.

3. *Id.*

4. *Id.* at 124, 617 A.2d at 1062.

porations.[5] Accordingly, the court held that the District of Columbia and other foreign municipal corporations are subject to the same venue rules as any private corporation.[6] This case marks the first time that the District of Columbia has ever been held subject to suit in a Maryland or other state court.[7]

1. The Case.—In June 1987, Carl S. Richardson escaped from the Oak Hill Youth Center (Oak Hill), a juvenile detention facility located near Laurel, Maryland.[8] Oak Hill is situated on a federal enclave and operated by the District of Columbia.[9] After Richardson's escape and before his recapture, he killed Thomas T. Hansford, Jr., in Prince George's County, Maryland.[10] Richardson was convicted of felony murder in the Circuit Court for Prince George's County on August 3, 1988.[11]

On August 15, 1988, the decedent's parents filed suit in the Circuit Court for Prince George's County against the District of Columbia, the Superintendent of Oak Hill, Neil Ollivierra, and Richardson.[12] The plaintiffs alleged that the District and Ollivierra negligently operated the juvenile facility, as evidenced by their failure to prevent Richardson's escape and inability to recapture him in a timely manner.[13] The plaintiffs further alleged that a District policy permitted escaped prisoners to remain at large and that this policy violated the decedent's civil rights.[14]

In its motion to dismiss, the District argued that, under Maryland law, the circuit court lacked jurisdiction over the District of Columbia,

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5. *Id.* at 123, 617 A.2d at 1062.

6. *Id.*

7. *Cf.* District of Columbia v. Coleman, 196 S.E.2d 926, 927 (Va. 1973) (per curiam) (dismissing a negligence claim against the District of Columbia without reaching the question of whether the trial court had jurisdiction over the matter). Moreover, the District has been held to suit only once in a federal court outside of the District. *See* United States v. District of Columbia, 596 F. Supp. 725, 727 (D. Md. 1984) (resolving a dispute between the federal government and the District of Columbia as to ownership of hospital property in Maryland), *aff'd*, 788 F.2d 239 (4th Cir. 1986).

8. *Hansford*, 329 Md. at 115, 617 A.2d at 1058.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* The plaintiffs alleged that one of every three escapees from Oak Hill was permitted to remain at large. *Id.* Accordingly, the plaintiffs sought relief under 42 U.S.C. § 1983 (1981), arguing that the District's delay in capturing escaped prisoners violated the decedent's civil rights by depriving him of his life without due process of law. *Hansford*, 329 Md. at 115, 617 A.2d at 1058.

a foreign municipal corporation.[15] Relying entirely on the venue rule enunciated in *Phillips v. Mayor of Baltimore*,[16] the circuit court dismissed the action and held that "a municipal corporation could not be sued, in [a] transitory action, outside of the jurisdiction in which it is located."[17]

On appeal to the Court of Special Appeals, the District offered an additional reason for affirming the circuit court's dismissal: that the cession of exclusive jurisdiction by the State of Maryland over the federal enclave upon which Oak Hill rests limited the authority of Maryland courts to resolve disputes arising from activities on that land.[18] Although Maryland expressly reserved jurisdiction over lands ceded to the United States before 1943,[19] the District argued that section 14-102 of the State Government Article made this reservation inapplica-

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15. *Id.* at 116-17, 617 A.2d at 1059. The District of Columbia is a distinct government entity not comparable to the States. Although it exercises many government functions typically performed by states, *see* Chewning v. District of Columbia, 119 F.2d 459, 461 (D.C. Cir.), *cert. denied*, 314 U.S. 639 (1941) (noting that the District maintains a National Guard, regulates insurance, and licenses automobiles), the District is not a "state" within the meaning of the Eleventh Amendment, Committee of Blind Vendors v. District of Columbia, 695 F. Supp. 1234, 1241 n.6 (D.D.C. 1988), and citizens of the District are not citizens of a state. Hepburn & Dundas v. Ellzey, 6 U.S. 445, 445 (1805). Ultimately, Congress has the authority "[t]o exercise exclusive [l]egislation" for all purposes over the District. U.S. CONST. art. I, § 8, cl. 17.

To relieve itself of the burden of legislating day-to-day local matters, Congress has declared the District of Columbia to be a municipal corporation:

> (a) The District is created a government by the name of the "District of Columbia," by which name it is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States. . . .
>
> (b) The District of Columbia shall remain and continue a body corporate as provided in subsection (a) of this section. Said corporation shall continue to be charged with all the duties, obligations, responsibilities, and liabilities, and to be vested with all of the powers, rights, privileges, immunities, and assets, respectively, imposed upon and vested in said corporation or the Mayor.

D.C. CODE ANN. § 1-102(a)-(b) (1992). Courts have consistently treated the District of Columbia as a municipal corporation. *See, e.g.*, Dornman v. District of Columbia, 888 F.2d 159, 162 (D.C. Cir. 1989); Haynesworth v. Miller, 820 F.2d 1245, 1271-72 (D.C. Cir. 1987). Moreover, the District's sovereign immunity derives from its own common law, not from the United States. *See* Wade v. District of Columbia, 310 A.2d 857, 861 (D.C. 1973) (concluding that the District was not entitled to sovereign immunity under the Federal Torts Claims Act).

16. 110 Md. 431, 72 A. 902 (1909).

17. *Hansford*, 329 Md. at 118, 617 A.2d at 1059. Concluding that more factual development was necessary to determine whether Ollivierra was entitled to governmental immunity, the circuit court did not dismiss the action against him. *Id.*

18. *See* Hansford v. District of Columbia, 84 Md. App. 301, 305, 578 A.2d 844, 846 (1990), *rev'd*, 329 Md. 112, 617 A.2d 1057, *cert. denied*, 113 S. Ct. 2997 (1993).

19. *See infra* note 32 and accompanying text.

ble to Oak Hill and other lands ceded between 1906 and 1943.[20] The Court of Special Appeals agreed and held that a Maryland court could not exercise jurisdiction over the District of Columbia because the District's alleged tortious conduct occurred on a federal enclave over which exclusive jurisdiction had been ceded to the United States.[21] The Court of Appeals granted certiorari and unanimously reversed the holdings of both lower courts.[22]

2. Legal Background.—

a. Jurisdiction.—The Court of Appeals has consistently held that the General Assembly's intent in enacting Maryland's long arm statute[23] was to expand the exercise of personal jurisdiction to the limits of due process.[24] Courts have distinguished between specific and general personal jurisdiction.[25] If general jurisdiction is present, a defendant may be subjected to suit on any claim in the forum state, even claims that do not arise out of, or are unrelated to, the defendant's contacts with the forum state.[26] Specific jurisdiction, on the other hand, gives rise to jurisdiction only for claims arising from a defendant's jurisdictional contacts with the forum state.[27] Section 6-

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20. *Hansford*, 329 Md. at 119, 617 A.2d at 1060. Oak Hill was acquired by the United States government in 1923. *Hansford*, 84 Md. App. at 305, 578 A.2d at 846.

21. *Hansford*, 84 Md. App. at 308-09, 578 A.2d at 847-48. The Court of Special Appeals did not address the circuit court's dismissal based on venue.

22. *Hansford*, 329 Md. at 135-36, 617 A.2d at 1068.

23. Maryland's long arm statute provides:

> (a) *Basis of personal jurisdiction.*—A court may exercise personal jurisdiction as to any cause of action over a person domiciled in, served with process in, organized under the laws of, or who maintains his principal place of business in the State.
>
> (b) *Exercise of jurisdiction on other basis.*—This section does not limit any other basis of personal jurisdiction of a court of the State.

MD. CODE ANN., CTS. & JUD. PROC. § 6-102 (1989).

24. *See* Camelback Ski Corp. v. Behning, 307 Md. 270, 274, 513 A.2d 874, 876 (1986), *cert. denied*, 488 U.S. 849 (1988) (holding that personal jurisdiction can be extended "to the limits allowed by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution"). *Accord* Androutsos v. Fairfax Hosp., 323 Md. 634, 594 A.2d 574 (1991); Curtis v. State, 284 Md. 132, 395 A.2d 464 (1978); Krashes v. White, 275 Md. 549, 341 A.2d 798 (1975).

25. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15 (1985); *Behning*, 312 Md. at 337-38, 539 A.2d at 1111.

26. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-49 (1952) (holding that a state may adjudicate a claim against a corporate defendant that did not arise from the defendant's contacts with the state).

27. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957) (holding that an Arizona company's single contact of mailing an insurance contract to a California resident was sufficient to support jurisdiction over a lawsuit arising directly from that contact).

103 of the Courts and Judicial Proceedings Article provides for the exercise of both specific and general jurisdiction.[28]

Section 6-101 of the Courts and Judicial Proceedings Article extends the jurisdiction of Maryland courts specifically to persons and entities on federal enclaves.[29] When the United States acquired Oak Hill, however, chapter 743, section 2, of the Maryland Sessions Laws of 1906 ceded to the United States exclusive jurisdiction over newly acquired federal lands:

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28. Section 6-103 provides:

(a) *Condition.*—If jurisdiction over a person is based solely upon this section, he may be sued only on a cause of action arising from any act enumerated in this section.

(b) *In general.*—A court may exercise personal jurisdiction over a person, who directly or by an agent:

(1) Transacts any business or performs any character of work or service in the State;

(2) Contracts to supply goods, food, services, or manufactured products in the State;

(3) Causes tortious injury in the State by an act or omission in the State;

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State;

(5) Has an interest in, uses, or possesses real property in the State; or

(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (1989).

Subsections (b)(1)-(3) and (5)-(6) provide for personal jurisdiction over defendants based on claims arising solely from defendants' purposeful contacts with the state, i.e., specific jurisdiction. Subsection (b)(4), in comparison, provides for jurisdiction over defendants based on any claim filed in a Maryland court, regardless of whether the claim arose from the defendants' purposeful contacts with Maryland.

29. Section 6-101 provides:

(a) For the purposes of personal jurisdiction, venue, and service of process, the following terms have the meanings indicated:

(b) "County" includes any federal enclave, reservation, or land within the geographical limits of the county.

(c) "Resident" includes a person residing on a federal enclave, reservation, or land in the State or a county.

(d) "State" includes any federal enclave, reservation, or land within the geographical limits of the State.

(e) *Legislative intent.*—It is the intention of the General Assembly to extend the personal jurisdiction and venue of courts of the State and the power to serve process of those courts to any person on federal enclaves, reservations, or lands within the State to the fullest extent permitted by the Constitution and laws of the United States.

MD. CODE ANN., CTS. & JUD. PROC. § 6-101 (1989).

> [E]xclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State, but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.[30]

In 1943, the General Assembly limited any cession of jurisdiction over federal enclaves to concurrent jurisdiction.[31] The federal government's exclusive jurisdiction over "persons" and "transactions" at the Oak Hill enclave and other lands acquired before 1943, however, was specifically retained.[32]

In *Lowe v. Lowe*,[33] the Court of Appeals addressed the precise question at issue in *Hansford*—whether a Maryland court could exercise jurisdiction over a cause of action arising out of a transaction occurring on an "exclusive" federal enclave.[34] *Lowe* involved a divorce action filed by residents of a federal enclave located in Cecil County, Maryland.[35] The court held that the Lowes, as residents of a federal enclave, were not Maryland residents and hence Maryland courts lacked jurisdiction over their divorce action.[36] The court determined that Maryland's cession of exclusive jurisdiction over federal enclaves "transfer[red] to the federal government exclusive dominion and jurisdiction thereover for all purposes."[37] The court explained that federal enclave residents, as evidenced by their inability to exercise

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30. 1906 Md. Laws 743.

31. Section 14-102 of the State Government Article provides that:

> (a) *In general.*—With respect to land that the United States or any of its units leases or otherwise holds in the State, the State reserves jurisdiction and authority over the land and over persons, property, and transactions on the land to the fullest extent that is permitted by the United States Constitution and that is not inconsistent with the governmental purpose for which the land is held.

MD. CODE ANN., STATE GOV'T § 14-102(a) (1993).

32. Section 14-102(b) provides in pertinent part:

> *Previous grants.*—This section does not affect the jurisdiction and authority of the State over land or persons, property, and transactions on land that the United States or its unit has acquired on or before May 31, 1943 to the extent that the State ceded jurisdiction under:
>
> . . . (4) Chapter 743, §§ 2 and 3, of the Acts of the General Assembly of 1906 . . . .

MD. CODE ANN., STATE GOV'T § 14-102(b) (1993).

33. 150 Md. 592, 133 A. 729 (1926), *overruled by* Hansford v. District of Columbia, 329 Md. 112, 617 A.2d 1057, *cert. denied*, 113 S. Ct. 2997 (1993).

34. *Id.* at 597-98, 133 A. at 731-32.

35. *Id.* at 597, 133 A. at 731.

36. *Id.* at 600-01, 133 A. at 733.

37. *Id.* at 599, 133 A. at 732. The *Lowe* court noted that the federal government's exclusive jurisdiction over lands acquired with the consent of the State of Maryland was based on Article I, Section 8, Clause 17 of the United States Constitution. *Id.* at 600, 133 A. at 732. This section of the Constitution authorizes Congress

political and civil rights under Maryland law,[38] were not "inhabitants of the state."[39] Rather, they resided in a "federal territory" over which the United States had exclusive authority and jurisdiction.[40]

Subsequent to *Lowe*, however, the Supreme Court, in *Howard v. Commissioners of Louisville*,[41] determined that the traditional view of the federal enclave as "a state within a state" had changed.[42] Further, in *Evans v. Cornman*,[43] the Supreme Court held that residents of a federal enclave in Maryland were residents of the state and could not be

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> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State . . . .

U.S. CONST. art. I, § 8, cl. 17. Maryland ceded to the United States jurisdiction for all purposes "except the service upon [federal enclaves] of all civil and criminal process" of Maryland courts. *Lowe*, 150 Md. at 594, 133 A. at 730 (quoting 1906 Md. Laws 743). The *Lowe* court determined that the purpose of this reservation was to prevent federal enclaves from "becoming a place of refuge for criminals or service-dodgers." *Id.* at 596, 133 A. at 731.

38. *See Lowe*, 150 Md. at 598, 133 A. at 735. The court noted that "persons residing upon [federal enclaves] are not residents of the State of Maryland for the purpose of exercising the right of franchise, for taxation purposes, or for school purposes . . . ." *Id.* at 600-01, 133 A. at 733.

39. *Id.* at 598, 133 A. at 732. The court noted that other courts that had considered the relationship of an "exclusive" federal enclave to the state in which it was located had, "with practical unanimity, held that the power of exclusive legislation carries with it exclusive jurisdiction, and in many cases [had] treated the cession as accomplishing a thorough separation of the land and its inhabitants from the state." *Id.*

40. *Id.* at 600, 133 A. at 733.

41. 344 U.S. 624 (1953).

42. *Id.* at 627. At issue in *Howard* was the annexation of an "exclusive" federal enclave by the City of Louisville, Kentucky. *Id.* at 626. The Petitioners argued that the federal enclave, because exclusive jurisdiction over it had been ceded to the federal government, was no longer part of the State of Kentucky. *Id.* In response to this argument, the *Howard* Court stated:

> When the United States, with the consent of Kentucky, acquired the property . . . , the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. . . . A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Id. at 626-27.

43. 398 U.S. 419 (1970).

denied the right to vote in Maryland elections.[44] In fact, the *Evans* Court expressly stated that federal enclave residents "are subject to the process and jurisdiction of [Maryland] courts; they themselves can resort to those courts in divorce [actions] . . . ."[45]

In *Gulf Offshore Co. v. Mobil Oil Corp.*,[46] the Supreme Court further delineated the power of state courts to exercise jurisdiction over lands in which the federal government has exclusive jurisdiction. The *Gulf Offshore* Court held that a state court could exercise subject-matter jurisdiction over a federal cause of action arising in a federal territory.[47] At issue in *Gulf Offshore* was whether the Outer Continental Shelf Lands Act (OCSLA), which reserved exclusive federal jurisdiction over the outer continental shelf, precluded a state court from exercising jurisdiction over a personal injury claim sustained by an oilman working on the shelf.[48] The Court determined that there is "[n]othing inherent in exclusive federal sovereignty over a territory [to] preclude[ ] a state court from entertaining a . . . suit concerning events occurring in [a] territory . . . governed by federal law."[49] The Court concluded that, absent a clear Congressional intent to confine jurisdiction to federal courts, state courts are presumed to have concurrent jurisdiction over a cause of action arising within a federal territory.[50]

The Court then examined the petitioner's contention that Congress had intended for OCSLA[51] to preclude state court jurisdiction over actions arising on the outer continental shelf.[52] The Court found that Congress intended the OCSLA to be a restriction on state

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44. *Id.* at 425-26.

45. *Id.* at 424.

46. 453 U.S. 473 (1981).

47. *Id.* at 484.

48. *Id.* at 475.

49. *Id.* at 481; *see also* Evans v. Cornman, 398 U.S. 419, 424 (1970) (holding that residents of an "exclusive" federal enclave are "subject to the process and jurisdiction of state courts . . . ."); Ohio River Contract Co. v. Gordon, 244 U.S. 68, 72 (1917) (holding that a state court had jurisdiction to hear a personal injury suit against a corporation doing business on a federal enclave within Kentucky).

50. *Gulf Offshore*, 453 U.S. at 477-78. The Court stated that Congress could rebut the presumption of concurrent jurisdiction "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court [sic] jurisdiction and federal interests." *Id.* at 478.

51. The portion of OCSLA at issue in *Gulf Offshore* provided that:

> [A]doption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

43 U.S.C. § 1333(a)(3).

52. *Gulf Offshore*, 453 U.S. at 481-82.

sovereignty only, not on state court jurisdiction.[53] The Court reasoned that the petitioner's argument had "confuse[d] the political jurisdiction of a State with its judicial jurisdiction."[54] Thus, because Congress was silent on the issue of judicial jurisdiction, the claim was held properly filed in state court.[55]

b. Venue.—Although the question of whether a municipal corporation can be sued in another state would appear to be one of jurisdiction, the few courts that have addressed the issue have based their decisions on the rule of venue.[56] At common law, absent an express statutory provision to the contrary,[57] an action could not be brought against a municipal corporation outside the county where it was situated.[58] The rationale behind this special rule for municipal corporations was that actions against municipalities are inherently local and not transitory.[59] Consequently, they must be brought in the county where the municipality is located.[60]

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53. *Id.* at 482.

54. *Id.* ("The language of the provision [of OCSLA] refers to 'any interest in or jurisdiction over' real property, minerals, and revenues, *not over causes of action.*") (emphasis added).

55. *Id.* at 484.

56. *See, e.g.*, Parks Co. v. City of Decatur, 138 F. 550, 553 (6th Cir. 1905) (holding that a Kentucky court was an improper venue for an action against an Illinois municipal corporation); O'Toole v. United States, 106 F. Supp. 804, 809 (D. Del. 1952) (holding that Delaware was not the "proper venue" for a wrongful death action against the District of Columbia), *aff'd on other grounds*, 206 F.2d 912, 918 (3d Cir. 1953); National Shawmut Bank v. City of Waterville, 189 N.E. 92, 94 (Mass. 1934) (analyzing suit against municipality in terms of venue).

57. The right to sue or obtain jurisdiction and venue over a municipal corporation must be provided by the state legislature. *See* Markham v. City of Newport News, 184 F. Supp. 659, 661 (E.D. Va. 1960), *rev'd on other grounds*, 292 F.2d 711 (4th Cir. 1961).

58. *See* Williams v. City of Lake City, 62 So. 2d 732, 734 (Fla. 1953) (en banc) ("Under the common law no action could be brought against a municipal corporation outside the county where it was situated . . . ."). *See generally* 17 MCQUILLEN, MUNICIPAL CORPORATIONS § 49.15 (3d ed. 1982).

59. The Supreme Court of Alabama described the difference between local and transitory actions as follows: "A local action is one which could only have arisen in the particular locality where it did arise, for example, where the subject matter is real estate. A transitory action is one which could have arisen anywhere, such as an action on a contract." *Ex Parte* City of Birmingham, 507 So. 2d 471, 473 (Ala. 1987).

60. *See Williams*, 62 So. 2d at 734 ("[A]ctions against municipal corporations are inherently local and . . . they must be sued in the county in which they are located."). The majority of courts have held that municipal corporations cannot be held to suit outside of their own courts. *See, e.g.*, Cullman County v. Blount County, 49 So. 315 (Ala. 1909) ("As a general rule all suits against a county must be brought in the courts of the defendant county."); Mayor of Nashville v. Webb, 85 S.W. 404, 405 (Tenn. 1905) ("[A]ctions against municipal corporations are inherently local . . . . They must be sued where they are found."). *See generally* 17 MCQUILLEN, *supra* note 58, § 49.15.

In *Mayor of Baltimore v. Meredith's Ford & Jarrettsville Turnpike Co.*,[61] the Court of Appeals recognized an exception to the special venue rule for municipal corporations. In *Turnpike*, the plaintiff sued Baltimore City for trespass in the Circuit Court for Baltimore County after a dam the City maintained caused flooding on the plaintiff's Baltimore County turnpike.[62] The *Turnpike* court was faced with two conflicting but well-established common law rules of venue: (1) that actions against municipalities are inherently local,[63] and (2) that actions involving real estate are also local and must be brought in the county where the land lies.[64] The court relied upon the latter rule of venue in holding that the action was properly brought in Baltimore County.[65] In so holding, it noted that the rule pertaining to real estate actions was well-settled at common law[66] and had never excepted municipal corporations.[67] The court reasoned that applying the special venue rule to local actions in this context "would result in [preventing] municipalities . . . , which have no Courts[,] from suing or being sued at all . . . ."[68]

Three years later in *Phillips v. Baltimore*,[69] however, the Court of Appeals applied the special venue rule for municipalities in a transitory action against Baltimore City.[70] The court acknowledged the general rule that local actions must be brought in the jurisdiction where the cause of action arose,[71] but held that, in the absence of a

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61. 104 Md. 351, 65 A. 35 (1906).

62. *Id.* at 354-55, 65 A. at 35.

63. *See supra* notes 59-60 and accompanying text.

64. *See Turnpike*, 104 Md. at 356, 65 A. at 35-36. "It has always been the settled law in England, that actions for injuries to real property should be brought in the county where the injuries occurred." *Id.* at 358, 65 A. at 36. This rule of venue was adopted by the Court of Appeals in Patterson v. Wilson, 6 G. & J. 499 (Md. 1834). In *Patterson*, the court explained that the rationale behind the venue rule pertaining to local actions was that actions should be brought "before a jury of the *vicinage*, who are presumed to be acquainted with the subject-matter to which the controversy relates, and therefore more competent to decide it than a jury of strangers." *Id.* at 500.

65. *Turnpike*, 104 Md. at 359, 65 A. at 36-37.

66. *Id.*, 65 A. at 36.

67. *Id.* at 357, 65 A. at 36 ("We have been referred to no decision in this State, that holds that a municipal corporation should not be bound by the rules of law, which are applicable to other litigants . . . .").

68. *Id.*

69. 110 Md. 431, 72 A. 902 (1909).

70. *Id.* at 436, 72 A. at 904.

71. *Id.* The court stated:

> Accepting as settled, and as properly settled, that in this State the rule requiring local actions to be brought in the jurisdiction where the cause of action arose, applies as well to public municipal corporations, as to all other corporations, we have only to inquire whether public municipal corporations can in this State be sued outside of their own Courts, upon transitory causes of action.

statute modifying it, the special venue rule for municipal corporations applied to transitory causes of action.[72] The court then examined the Maryland venue statute pertaining to suits against corporations[73] to determine whether the General Assembly had changed the special venue rule.[74] The court concluded that the legislature did not intend the venue statute, which did not specify municipal corporations, to eliminate the special venue rule.[75]

In making this determination, the court stressed the great inconvenience to public business that would follow if municipal corporations could be sued in foreign jurisdictions.[76] To avoid this result, the court concluded that, "under the established rules of legislative interpretation," an exception for municipal corporations based on public policy grounds must be read into the venue statute.[77] This inconvenience argument, however, has not been uniformly accepted. In *Eck v. State Tax Commissioners*,[78] for example, the Court of Appeals held the *Phillips* venue rule inapplicable to suits brought against public officials.[79]

Id.

72. *See id.* ("It is not, and cannot be, pretended, that at common law [municipalities] could be [sued in foreign courts for transitory actions], so that we need only to inquire whether the common law rule has been changed . . . by any statute of Maryland.").

73. The venue statute provided, in pertinent part, that:

> [e]very corporation of this State may be sued in any county, or in the City of Baltimore, as the case may be, where its principal office is located, or where it regularly transacts business or exercises its franchises, or in any local action, where the subject-matter thereof lies, and process may be served as is hereinabove provided against such corporation . . . .

Id. at 437, 72 A. at 905 (citing 1908 MD. LAWS 240).

74. *Id.* at 436-38, 72 A. at 904-05.

75. *Id.* at 437-38, 72 A. at 905.

76. *Id.* at 440, 72 A. at 906. The court stated that:

> [t]he magnitude and importance of the functions of municipal government are constantly increasing with the growth of population, and of the various and complex agencies employed in cities and towns in the public service, and these functions require the constant presence and watchfulness of those charged with their direction and management. To permit these great public duties to be hindered or delayed in their performance, in order that individuals or private corporations might more conveniently collect their private debts, would be to pervert the great object of the creation of municipal corporations.

Id.

77. *Id.*

78. 204 Md. 245, 103 A.2d 850 (1953).

79. *See id.* at 253-54, 103 A.2d at 855 (holding that public officials were covered under the general venue statute and that suit could be brought against them wherever they could be reached).

3. The Court's Reasoning.—

a. Jurisdiction.—In its analysis of jurisdiction, the *Hansford* court emphasized the separate concepts of a court's personal jurisdiction, a court's authority to resolve disputes arising outside its jurisdiction, and a state government's executive, legislative, and administrative authority.[80] The court first noted that section 6-101 of the state's long arm statute treats federal enclaves in the state as part of Maryland.[81] Because the action against the District of Columbia arose out of its activities within Maryland, the *Hansford* court had no difficulty concluding that the circuit court could exercise personal jurisdiction over it.[82]

The court next considered whether Maryland's cession of exclusive jurisdiction limited the circuit court's exercise of jurisdiction over disputes arising on the federal enclave.[83] The court concluded that section 14-102(b) of the State Government Article did not restrict in any manner the subject-matter jurisdiction of the Maryland courts.[84] It determined, rather, that the State Government Article "deals entirely with the governing authority of the State of Maryland," not with the jurisdiction of Maryland courts.[85] Accordingly, the court found nothing in the State Government Article that limited the traditional authority of Maryland courts to resolve disputes between litigants over whom personal jurisdiction had been acquired.[86] The court determined instead that section 14-102(b) restricted only the applicability of state law and state governmental authority over federal enclaves ceded prior to 1943.[87] Thus, the court concluded that the Court of Special Appeals had "'confuse[d] the political jurisdiction of [Maryland] with its judicial jurisdiction.'"[88]

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80. *See Hansford*, 329 Md. at 127, 617 A.2d at 1064.

81. *Id.*; *see supra* note 23 (quoting the state's long arm statute).

82. *Hansford*, 329 Md. at 127-28, 617 A.2d at 1064. The court noted that the District was subject to personal jurisdiction under four provisions of the long arm statute: "[t]he District of Columbia was served with process in the State of Maryland, [§ 6-102(a)] . . . ; [t]he District transacts business and performs work or service in the State, § 6-103(b)(1); the District allegedly caused tortious injury in the State by an act or omission in the State, § 6-103(b)(3); the District uses real property in the State, § 6-103(b)(5)." *Id.* at 128 n.7, 617 A.2d at 1064 n.7.

83. *Id.* at 128, 617 A.2d at 1064-65.

84. *Id.* at 129, 617 A.2d at 1065.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 482 (1981)). The court interpreted the State Government Article as restricting Maryland's political jurisdiction only: "Section 14-102(b) simply purports to restrict the applicability of Maryland law

The *Hansford* decision also overruled the *Lowe* holding that prohibited Maryland courts from exercising jurisdiction over transactions arising on federal enclaves.[89] In so doing, the court recognized that subsequent Supreme Court rulings had rendered obsolete the traditional "state within a state" relationship between federal enclaves and the states in which they are located.[90] The court concluded that the new relationship, as stated explicitly in *Evans*, makes federal enclave residents "'subject to the process and jurisdiction of state courts . . . .'"[91]

b. Venue.—The *Hansford* court also addressed the circuit court's reliance on *Phillips* in determining that Maryland was an improper venue for the action against the District of Columbia.[92] The court undermined the significance of *Phillips* by pointing out that, prior to *Phillips*, it had, in *Turnpike*, expressly rejected the special venue rule that a municipal corporation could be sued only in its own courts.[93] The court also stressed its statement in *Turnpike* that, in determining proper venue, a municipal corporation "should be treated like any other litigant."[94] In addition, the court noted the *Eck* court's refusal to apply the special venue rule "to suits against public officials relating to the performance of their official duties."[95] Moreover, the court stated that there have been a number of Maryland cases in which, without discussion, a municipality has been subject to suit outside its borders, implying that courts were simply ignoring the *Phillips* holding.[96]

In addition, the court pointed to two reasons why the *Phillips* decision was inapplicable to the District of Columbia.[97] First, the court asserted that the *Phillips* venue rule applied strictly to actions brought

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and Maryland executive and administrative governmental authority over federal enclaves ceded prior to 1943." *Id.*

89. *Id.* at 133, 617 A.2d at 1067.

90. *Id.; see supra* notes 41-55 and accompanying text.

91. *Hansord*, 329 Md. at 133, 617 A.2d at 1067 (quoting Evans v. Cornman, 398 U.S. 419, 424 (1970)).

92. *Id.* at 121, 617 A.2d at 1061.

93. *See id.* at 124, 617 A.2d at 1062.

94. *Id.*

95. *Id.* at 123, 617 A.2d at 1062.

96. *Id.* at 124, 617 A.2d at 1062. In support of this proposition, the court cited only to Alexander v. Montgomery County, 87 Md. App. 275, 589 A.2d 563 (1991), where a worker's compensation claim against Montgomery County was appealed to the Circuit Court for Prince George's County. *Hansford*, 329 Md. at 124, 617 A.2d at 1062.

97. *Id.* at 122-23, 617 A.2d at 1061-62.

against Maryland municipalities.[98] Applying the rule to foreign municipal corporations, the court reasoned, would grant the District and other foreign municipalities the "unique privilege" of immunity from suit in Maryland.[99] Finding "no sound reason" to distinguish between public and private corporations, the court held that foreign municipal corporations are to be subjected to the same venue rules as those governing private corporations.[100] Second, the court noted that the venue statute construed by the *Phillips* court had been replaced.[101] The court held that the broader language employed in the modern venue statute[102]—specifically the term "defendant"—applied to municipal corporations.[103] Accordingly, the court held that the venue analysis of *Phillips* was inapplicable to the modern venue statute.[104]

4. Analysis.—

a. Jurisdiction.—In *Hansford,* the Court of Appeals held that the District of Columbia could be sued in Maryland for its activities on federal land located in Maryland, effectively rectifying the jurisdictional errors made by the Court of Special Appeals. Moreover, each of the court's jurisdictional rulings was well-grounded in sound statutory interpretation and ascertainable legislative intent.

The court's determination that the General Assembly intended, in enacting section 6-101, to extend personal jurisdiction to persons and entities on federal enclaves is incontrovertible.[105] Even in the statute ceding exclusive jurisdiction to the United States, Maryland retained the right to serve process on federal enclaves.[106] Reservation of the state's right to serve process was the precursor to the state's long arm jurisdiction over activities on federal enclaves.[107] In addition, the

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98. *See id.* at 122, 617 A.2d at 1061 ("The rule that was applied in *Phillips* [was] that a Maryland municipality, sued in a Maryland court in a transitory action, should be sued where it is situated.").

99. *Id.*, 617 A.2d at 1062.

100. *Id.* at 123, 617 A.2d 1062. The court stated that the District of Columbia was, in the context of this case, a "nonresident corporate defendant." *Id.* at 122, 617 A.2d at 1061.

101. *Id.* at 123, 617 A.2d at 1062.

102. The modern general venue statute provides, in pertinent part, that "a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation." MD. CODE ANN., CTS. & JUD. PROC. § 6-201 (1989).

103. *Hansford,* 329 Md. at 123, 617 A.2d at 1062.

104. *Id.*

105. *See supra* note 29 and accompanying text.

106. *See Hansford,* 329 Md. at 129, 617 A.2d at 1065; *see also supra* note 30 and accompanying text.

107. The Court of Appeals for the Fourth Circuit has explained that when

court based its holding on principles of specific jurisdiction.[108] Thus, it can be limited to granting jurisdiction only in cases in which the claim against the District arises from the District's contacts inside Maryland.[109]

The court's determination that the statutes ceding exclusive jurisdiction over federal lands did not restrict the subject-matter jurisdiction of Maryland courts over those lands also was well supported. These statutes appear in the State Government Article, which delineates the roles of the legislative and executive branches of the state government, but makes no mention of the state judiciary. The court's conclusion that the State Government Article is applicable only to the legislative and executive powers of the state, and not to the judicial power of the state courts,[110] was perfectly logical.

The court's conclusion that *Lowe* was inconsistent with controlling Supreme Court precedent also was correct. In *Howard*, the Court contravened the central premise of *Lowe* by indicating that federal enclaves are not entirely distinct from the state in which they are located.[111] Then, in *Evans*, the Court specifically held that federal enclave residents were subject to the jurisdiction of state courts.[112] Finally, the *Gulf Offshore* Court extended state court jurisdiction to federal causes of actions arising on lands over which the United States has exclusive jurisdiction.[113]

> the state has retained the right to serve process on foreign corporations as well as on others within the [federal enclave] and has the power to say what shall constitute such service, it follows that any act which may be legally taken as an acceptance of service elsewhere within the state may be so taken within the [federal enclave]. This necessarily means that the doing of business by a foreign corporation within the [enclave] has the same effect, so far as submitting itself to the local jurisdiction for the service of process is concerned, as doing business elsewhere in the state.

Knott Corp. v. Furman, 163 F.2d 199, 206 (4th Cir. 1946), *cert. denied*, 332 U.S. 809 (1947).

108. *See supra* note 27 and accompanying text.

109. *See Hansford*, 329 Md. at 127-28, 617 A.2d at 1064. In its brief, the District argued that recognizing jurisdiction in this case would mean that the District could be sued in Maryland for virtually any injury. It attempted to warn the court about the

> broad implications of petitioner's theory that the District can be sued in the Maryland courts because its governmental operations on federal land give it a permanent "presence" in Maryland for jurisdictional purposes. That presence would apparently allow plaintiffs to sue the District in Maryland courts *for injuries which have no relationship to the District's Maryland operations, presumably including injuries which occur outside Maryland, in the District or elsewhere.*

Brief of Respondent at 11 (citation omitted) (emphasis added).

110. *See Hansford*, 329 Md. at 129, 617 A.2d at 1065.

111. *See supra* notes 40-41 and accompanying text.

112. *See supra* notes 42-44 and accompanying text.

113. *See supra* notes 45-55 and accompanying text.

b. Venue.—In concluding that the special venue rule for municipal corporations had been rejected, the *Hansford* court misconstrued its prior holdings in *Turnpike* and *Phillips.* Moreover, the court's determination that the special venue rule was limited to intrastate municipalities was inconsistent with the common law. In holding that foreign municipal corporations are subject to the same venue rules as private corporations, the *Hansford* court made a decision more properly suited for the General Assembly.

The special venue rule for municipal corporations was not, as the court stated, rejected in *Turnpike.* In *Turnpike,*[114] the court, confronted with two well-established but conflicting rules of venue, simply carved out a "local actions" exception to the rule that municipalities cannot be sued outside of their jurisdictions.[115] The necessity of this exception was illustrated in the *Turnpike* case itself, where strict adherence to the special venue rule would have immunized Baltimore City from suit for its destruction of land in another jurisdiction.[116] As the court later recognized in *Phillips, Turnpike* left "undetermined whether . . . a [municipal] corporation can be sued in Courts other than those of its own territorial limits, upon a transitory cause of action."[117] Moreover, the subsequent decision in *Phillips* to apply the special venue rule in a transitory action against a municipality[118] has been vindicated by the fact that after eighty-four years not one domestic or foreign municipality has been held to suit outside of its county in Maryland.[119]

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114. *See supra* notes 61-68 and accompanying text.

115. *See* Mayor of Baltimore v. Meredith's Ford & Jarrettsville Turnpike Co., 104 Md. 351, 357, 65 A. 35, 36 (1906). The *Hansford* court interpreted *Turnpike* as eliminating all distinctions between a "municipal corporation . . . [and] any other litigant," *Hansford,* 329 Md. at 124, 617 A.2d at 1062, but the *Turnpike* holding was limited to the "class of cases" involving local actions. *Turnpike,* 104 Md. at 357, 65 A. at 36.

116. *See Turnpike,* 104 Md. at 357, 65 A. at 36.

117. Phillips v. Baltimore, 110 Md. 431, 435, 72 A. 902, 904 (1909).

118. *See supra* notes 69-77 and accompanying text.

119. The *Hansford* court cited only Alexander v. Montgomery County, 87 Md. App. 275, 589 A.2d 563 (1991), in support of its proposition that a municipal corporation had been subjected to suit outside its county since *Phillips.* This case involved an appeal from an order of the Workers' Compensation Commission. *Id.* Cases involving workers' compensation have special rules of venue that take into account the interests of injured workers in having their claims litigated close to home. Howell v. Bethlehem-Sparrows Point Shipyard, Inc., 190 Md. 704, 711, 59 A.2d 680, 682-83 (1948). For example, § 9-738 of the Labor and Employment Article provides, in pertinent part, that "[t]o take an appeal, a person shall file an order of appeal with the circuit court: (1) that has jurisdiction *over that person* . . . ." MD. CODE ANN., LAB. & EMPL. § 9-738 (1991) (emphasis added).

Interestingly, the General Assembly has enacted venue provisions specifically aimed at municipal corporations. For instance, in workers' compensation litigation, § 9-724 of the Labor and Employment Article provides, in pertinent part, that:

The *Hansford* court also misinterpreted the special venue rule as applying strictly to intrastate municipalities. Although the *Phillips* court applied the special venue rule in an action involving a Maryland municipality,[120] the rule at common law was not limited by state boundaries.[121] The special venue rule recognized the common law view "that municipalities are localized . . . and have no legal presence outside the county of their location."[122] The few jurisdictions that have held foreign municipal corporations to suit have either not ap-

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(a) *Governmental agency defined.*—In this section, "governmental agency" includes:

(1) a county;

(2) a county board of education;

(3) a statutory bicounty agency; and

(4) an incorporated municipality.

(b) *Election by covered employee.*—Except as provided in subsection (c) of this section, a covered employee may elect to have a hearing on a claim of the covered employee held in:

. . . .

(2) the county where the covered employee resided when the . . . injury . . . allegedly occurred . . . .

(c) *Governmental agency employer.*—Unless the covered employee objects, if the employer is a governmental agency, the [Workers' Compensation] Commission shall conduct a hearing in the county in which the governmental agency is located . . . .

MD. CODE ANN., LAB. & EMPL. § 9-724 (1991).

As demonstrated in § 9-724, the General Assembly was aware that municipal corporations could not be sued outside their borders; otherwise it would not have provided a specific exception for injured employees. Furthermore, the General Assembly was aware of the special venue rule and could easily have amended the general venue statute to specify municipal corporations. Thus, contrary to the court's assertion, Maryland courts have not ignored the special venue rule enunciated in *Phillips*.

120. *See supra* notes 70-75 and accompanying text.

121. *See, e.g.*, Parks Co. v. City of Decatur, 138 F. 550 (6th Cir. 1905) (holding that a Kentucky court did not have venue over an Illinois municipal defendant); O'Toole v. United States, 106 F. Supp. 804 (D. Del. 1952) (holding that a Delaware court was not the proper venue for an action against the District of Columbia), *aff'd on other grounds*, 206 F.2d 912, 918 (3rd Cir. 1953); Eastern Union Co. v. Moffat Tunnel Improvement Dist., 178 A. 864, 865 (Del. Super. Ct. 1937) ("The law seems to be quite well settled that a municipal corporation is liable to suit only in the State of its creation."), *overruled by* City of Wilmington v. Spencer, 391 A.2d 199 (Del. 1978). In addition to the few cases that have dealt with the venue question as it pertains to foreign municipal corporations are the many instances in which such actions are dismissed at the trial level for improper venue or lack of personal jurisdiction. Apparently, trial courts had consistently applied the *Phillips* special venue rule in dismissing actions filed against the District of Columbia in Maryland. *See* Brief of Respondent at 31.

122. National Shawmut Bank v. City of Waterville, 189 N.E. 92, 94 (Mass. 1934).

plied the common law rule[123] or have determined that the actions undertaken by the municipal corporation were not local in nature.[124]

In interpreting the modern general venue statute as including municipal corporations, the court deviated from its holding in *Phillips* that municipal corporations could not be sued outside their borders absent clear legislative guidance.[125] Neither the current general venue statute[126] nor the specific venue statute at issue in *Hansford*[127] refer specifically to municipal corporations, and the court recently reaffirmed the proposition that general statutes should be construed as not applying to municipal corporations.[128] Significantly, the General Assembly has never amended the venue statutes to include municipal corporations, although it has modified other judicial holdings pertaining to suits against municipal corporations.[129]

5. Conclusion—In *Hansford v. District of Columbia*, the Court of Appeals held the District of Columbia to suit for its alleged tortious conduct inside Maryland. *Hansford* marks the first time in which the District of Columbia has been held to suit in any state court. Although the court's determinations regarding jurisdiction were well supported, its disregard of the special venue rule for municipalities

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123. *See id.* (concluding that the special venue rule for municipal corporations was never adopted in the Massachusetts common law).

124. *See, e.g.*, Harman v. City of Ft. Lauderdale, 234 N.Y.S. 196, 199-200 (N.Y. Sup. Ct. 1929) (holding that since the municipality was not carrying out 'local' governmental functions, the special venue rule did not apply). *But see* Hillhouse v. City of Kansas City, 559 P.2d 1148, 1151 (Kan. 1977) (judicially abolishing the special venue rule for municipal corporations).

125. *See* Phillips v. Mayor of Baltimore, 110 Md. 431, 437-40, 72 A. 902, 905-06 (1909). The *Phillips* court noted the overriding public policy behind the special venue rule and held that "under the established rules of legislative interpretation," municipal corporations should, absent an express statutory directive, be excepted from the general provisions of the state venue statute. *Id.* at 437-38, 72 A. at 905.

126. *See supra* note 102.

127. The specific venue statute provides, in pertinent part, that tort actions based on negligence may be brought in the county "[w]here the cause of action arose . . . ." MD. CODE ANN., CTS. & JUD. PROC. § 6-202(8) (1989).

128. *See* Mayor of Baltimore v. Hooper, 312 Md. 378, 385-86, 539 A.2d 1130, 1133 (1988).

129. For instance, the Court of Appeals held for over 125 years that wages of municipal employees could not be attached. *See* Mayor of Baltimore v. Comptroller of the Treasury, 292 Md. 293, 298-99, 439 A.2d 1095, 1098 (1982). In response to *Comptroller*, "[t]he General Assembly got the message and responded promptly . . . [by] enact[ing] . . . § 15-607 of the Commercial Law Article," which effectively reversed the court's decision. *Hooper*, 312 Md. at 382, 539 A.2d at 1132-33.

was without adequate legal basis and should have been left to the decision of the General Assembly.

DAVID W. FISCHER

II. COMMERCIAL LAW

A. *Lessons on Modifying Demand Notes*

In *Jenkins v. Karlton*,[1] the Court of Appeals held that (1) parol evidence is inadmissible to vary the terms of a note that clearly states that it is due on demand;[2] (2) a letter sent by a payee indicating that no demand will be made for at least a year from the date of the note does not, under section 3-119 of the Commercial Law Article,[3] modify the note's due date;[4] and (3) the statute of limitations for an acknowledgement accrues from the date of the acknowledgement even when it mentions a future due date.[5] In so holding, the court continued its strict application of the parol evidence rule and the Uniform Commercial Code (U.C.C.) as adopted by Maryland.[6] The court also discussed an approach for modifying the terms of promissory notes.[7] The outcome of the case was not unusual, but the court's analysis of the case under section 3-119 and its attempt to clarify section 3-119's terms were peculiar and confusing.

1. The Case.—On February 21, 1985, Jenkins executed a promissory note to Karlton, the payee, in the amount of $15,000.[8] The note stated that it was payable "on demand."[9] Although the parties had a business relationship, Karlton loaned Jenkins the money after Jenkins indicated he was having personal financial troubles.[10] At the time of the loan, Karlton told Jenkins, "Pay me back when you can. It appears to me that you're going to have a good future with us. You should be able to make money. Pay me back when you can."[11]

As a result of a phone conversation in which Jenkins expressed concern regarding his ability to repay the loan,[12] Karlton sent Jenkins a letter, dated June 14, 1985, which stated:

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1. 329 Md. 510, 620 A.2d 894 (1993).
2. *Id.* at 525-26, 620 A.2d at 902.
3. MD. CODE ANN., COM. LAW I § 3-119 (1992).
4. *Jenkins*, 329 Md. at 529, 620 A.2d at 904.
5. *Id.* at 531-32, 620 A.2d at 904-05.
6. Maryland adopted the U.C.C. in 1963. *Id.* at 517, 620 A.2d at 898. Title 3 of the Commercial Law Article applies to negotiable instruments. MD. CODE ANN., COM. LAW I § 3-119 (1992).
7. *See Jenkins*, 329 Md. at 532 n.8, 620 A.2d at 905 n.8.
8. *Id.* at 514, 620 A.2d at 896.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 515, 620 A.2d at 896.

> We have agreed that even though the note is a demand note, no demand would be made for at least one year from the time that I lent you the money. Therefore, you can be assured that no demand will be made earlier than February 15, 1986, and I would be willing to extend it three months beyond that, which would get you through the tax season, if it will help you.[13]

On July 7, 1988, Karlton made a demand for payment on the note.[14] After Jenkins denied owing Karlton any money,[15] Karlton filed suit in the Circuit Court for Baltimore County on September 26, 1988.[16] The trial court granted Jenkins's motion for judgment[17] based on his argument that, since Karlton filed suit more than three years after the note was executed, the suit was barred by the statute of limitations.[18] In granting Jenkins's motion, the trial court found that neither the surrounding circumstances of the loan nor the June 14, 1985, letter took the note out of the general rule that a cause of action for recovery on a demand note accrues on the date the note was executed.[19]

The Court of Special Appeals reversed.[20] Referring to the conversation between Jenkins and Karlton and the June 14, 1985 letter, the court reasoned that the purpose and circumstances of the transaction brought the note within an exception to the general rule that a cause of action on a demand note accrues immediately.[21] The Court of Appeals reversed and remanded to the Court of Special Appeals with instructions to reinstate the judgment of the circuit court.[22]

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13. *Id.*

14. *Id.*

15. *Id.* at 515 n.1, 620 A.2d 896 n.1.

16. *Id.* at 515, 620 A.2d at 897.

17. *Id.* at 515 n.2, 620 A.2d at 897 n.2. The court explained that Jenkins's motion to dismiss was really a motion for judgment pursuant to Maryland Rule 2-519 because testimony had been presented. *Id.*

18. *Id.* at 515, 620 A.2d at 897.

19. *Id.* at 516, 620 A.2d at 897; *see also* Karlton v. Jenkins, 86 Md. App. 556, 558, 587 A.2d 580, 581 (1991) (stating that "a note payable on demand is payable immediately, without demand" and limitations "begin to run on the day of execution of such an instrument") (citation omitted), *rev'd*, Jenkins v. Karlton, 329 Md. 510, 620 A.2d 894 (1993).

20. *Karlton*, 86 Md. App. at 559, 587 A.2d at 581.

21. *Id.* at 558-59, 587 A.2d at 581 (citing Fells Point Sav. Inst. v. Weedon, 18 Md. 320 (1862); Blick v. Cockins, 131 Md. 625, 102 A. 1022 (1917)).

22. *Jenkins*, 329 Md. at 532, 620 A.2d at 905.

2. Legal Background.—

a. Demand Notes and Parol Evidence.—Consistent with generally accepted principles of commercial and contract law, Maryland law holds that a demand note is payable immediately, without demand.[23] As a result, the statute of limitations begins to run when the note is issued.[24] This common law rule was codified in 1963 when Maryland adopted the U.C.C.[25]

Maryland courts long ago recognized exceptions to this rule.[26] In *Fells Point Savings Institution v. Weedon*,[27] the Court of Appeals held that the statute of limitations on a certificate of deposit that was due on demand did not begin to run until a condition that the certificate first be returned was met.[28] Similarly, in *Blick v. Cockins*,[29] the court refused to find that the plaintiff's claim was barred by the statute of limitations because the note contained allowances for requesting additional collateral and other provisions that indicated it was to mature in the future.[30] The court held that the general rule concerning due

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23. Continental Oil Co. v. Horsey, 177 Md. 383, 385, 9 A.2d 607, 608 (1939).

24. *Id.* at 386, 9 A.2d at 608; Young v. Mayne Realty Co., 48 Md. App. 662, 666, 429 A.2d 296, 298 (1981). *See generally* J.A. Bock, Annotation, *When Statute of Limitations Begins to Run Against Notes Payable on Demand*, 71 A.L.R.2d 284, 287-95 (1957) (setting out the generally accepted law that demand notes are due on the date of issue).

25. *Jenkins*, 329 Md. at 517, 620 A.2d at 898. Section 3-122 provides in part: "(1) A cause of action against a maker or an acceptor accrues (a) In the case of a time instrument on the day after maturity; (b) In the case of a demand instrument upon its date, or if no date is stated, on the date of issue." MD. CODE ANN., COM. LAW I § 3-122(1) (1992). In order for § 3-122 to apply, the note must be a negotiable instrument as defined by § 3-104, which provides in part:

> (1) Any writing to be a negotiable instrument within this title must
>
> (a) Be signed by the maker or drawer; and
>
> (b) Contain an unconditional promise or order to pay a sum certain in money . . .
>
> (c) Be payable on demand or at a definite time; and
>
> (d) Be payable to order or to bearer.
>
> (2) A writing which complies with the requirements of this section is . . . .
>
> (c) A "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
>
> (d) A "note" if it is a promise other than a certificate of deposit.

Id. § 3-104.

26. *See infra* notes 27-32 and accompanying text; *see also* Bock, *supra* note 24, at 309 (discussing exceptions to the general rule of when demand notes are due).

27. 18 Md. 320 (1862).

28. *Id.* at 326.

29. 131 Md. 625, 102 A. 1022 (1917).

30. *Id.* at 631, 102 A. at 1024. The *Blick* court stated:

> [T]he terms of the note, which was given for a loan, are wholly inconsistent with the theory that it was intended to become due and payable from the time of its delivery. It provides for the contingency of its maturity occurring at some future

dates of demand notes does not apply "when a different intention of the parties is apparent from the terms of the instrument or the purpose and circumstances of the transaction."[31] Since the note at issue was due upon either actual demand or default by a party, the court found that a cause of action would not accrue until one of those conditions had occurred.[32] Prior to *Jenkins,* however, no Maryland court had invoked *Weedon* or *Blick* to alter the due date of a demand note.

Other states have found it necessary to consider the parties' intentions to determine when a note is due.[33] In *McRae v. Smith,*[34] for example, the Georgia Court of Appeals refused to apply the rule that a loan made without a due date is due on its date of execution, even when the parties agreed that the maker was to pay the plaintiff back "when [he] could do so and within a reasonable time."[35] Instead, it held that the statute of limitations would not begin to run until demand was made.[36]

In making exceptions regarding when demand notes become due, courts often consider whether parol evidence can be admitted to interpret or modify the usual terms of a demand note.[37] The parol evidence rule states that prior or contemporaneous evidence cannot be admitted to vary the terms of a clear and unambiguous writing that was a complete integration of the agreement and was meant to serve

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> period as a result of the maker's failure to furnish additional securities when desired by the payee. It requires a rebate of interest in the event of the payment of the note prior to its maturity. These provisions, and that relating to the substitution of other collateral from time to time by mutual consent, clearly indicate the purpose of the parties that the note should not become due on delivery . . . .

Id.

31. *Id.* at 630, 102 A. at 1024.

32. *See id.*

33. *See* McRae v. Smith, 282 S.E.2d 676, 677 (Ga. App. 1981) (holding that where the defendant was to repay a loan from the plaintiff "when he could do so and within a reasonable time," the statute of limitations did not begin to run until the date of the demand); United States Fidelity & Guar. Co. v. Krebs, 190 So. 2d 857 (Miss. 1966) (holding that an actual demand is required to begin the running of limitations only when it is clear from language that the parties themselves so intended); Richman v. Kauffman, 48 A.D.2d 988 (N.Y. App. Div. 1975) (holding that language in the note making a demand possible only after an expressed condition was met took the note out of the limitations period); DiBattista v. Butera, 244 A.2d 857, 859 (R.I. 1968) (recognizing that when it is clear that the parties intended demand to be a condition precedent to an obligation to pay, the statute of limitations does not begin to run until demand is made).

34. 282 S.E.2d 676 (Ga. App. 1981).

35. *Id.* at 677.

36. *Id.*

37. *See* Foreman v. Melrod, 257 Md. 435, 442, 263 A.2d 559, 562 (1970) (noting that parol evidence may not be admitted to alter the due date of a promissory note); *DiBattista,* 244 A.2d at 859 (admitting parol evidence to show that a demand note was not due until a formal demand was made).

as the final intention of the parties.[38] Maryland courts have strictly adhered to the parol evidence rule when interpreting contracts.[39] In applying the rule to negotiable instruments, the court has stated that "[p]arol evidence . . . is not admissible to vary the *time of payment* expressed in a promissory note or to contradict other provisions in the note . . . ."[40]

b. The Effect of Separate Writings on Negotiable Instruments: U.C.C. Section 3-119.—Under common law, all writings that are part of the same transaction must be read together as a single agreement.[41] Section 3-119 of the Commercial Law Article applies this rule to negotiable instruments by stating that a separate writing can affect or modify an instrument if it is "part of the same transaction."[42] In cases involving promissory notes, such writings are usually documents like mortgages or collateral security agreements from which the notes stem.[43] Courts have defined "same transaction" to mean "so proximate in time as to grow out of, elucidate and explain the quality and character of the transaction, or an occurrence within such time as would reasonably make it a part of the transaction."[44]

In most situations in which courts have applied section 3-119 of the U.C.C., the writings additional to the note have served a common transactional purpose.[45] In some instances the separate writings have

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38. Crothers v. National Bank, 158 Md. 587, 595-96, 149 A. 270, 274 (1930).

39. *See* General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 492 A.2d 1306 (1985). The *Daniels* court held that an action brought by a car dealership against two brothers to recover on a sales contract was valid against both brothers even though one brother had been told he was only guaranteeing the loan. *See id.* at 262, 492 A.2d at 1310-11. The court concluded that the writing was clear because he signed the loan on a line that said "buyer." *Id.*

40. *Foreman*, 257 Md. at 442, 263 A.2d at 562.

41. Reese v. First Mo. Bank & Trust Co., 664 S.W.2d 530, 535 (Mo. App. 1983); Sanden v. Hanson, 201 N.W.2d 404, 408 (N.D. 1972); Kemmler Memorial Found. v. 691/733 E. Dublin-Granville Rd. Co., 584 N.E.2d 695, 699 (Ohio 1992); MD. CODE ANN., COM. LAW I § 3-119 cmt. 3 (1992).

42. Section 3-119 provides in pertinent part: "As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction . . . . A separate agreement does not affect the negotiability of an instrument." MD. CODE ANN., COM. LAW I § 3-119(1)-(2) (1992).

43. *Id.* § 3-119 cmt. 1. "The separate writing is most commonly an agreement creating or providing for a security interest such as a mortgage, chattel mortgage, conditional sale or pledge." *Id.*

44. Elsberry Equip. Co. v. Short, 211 N.E.2d 463, 468 (Ill. App. 1965); *see also Sanden*, 201 N.W.2d at 408 (adopting the definition set out in *Elsberry*); 5 RONALD ANDERSON, UNIFORM COMMERCIAL CODE § 3-119:4 (1984).

45. *See* Kucel v. Walter E. Heller & Co., 813 F.2d 67, 71 (5th Cir. 1987) (resolving a dispute over the amount of interest on a promissory note by looking at the mortgage,

preceded the note,[46] but in most, they are executed at the same time.[47] However, writings executed contemporaneously with a promissory note are not necessarily a part of the same transaction, especially when the note and writing do not refer to one another.[48] Furthermore, the separate writing should not contradict the terms of the note.[49]

c. Acknowledgements.—An acknowledgement of a debt revives the remedy of a creditor when the statute of limitations has run.[50] It can be an express promise to pay an existing debt, a promise to pay once a condition has been performed, or an acknowledgement of the debt from which a promise to pay can be inferred.[51] The acknowledgement must be a "clear, distinct, and unqualified admission."[52] In Maryland, unlike in other states, while an acknowledgement of the debt must be unqualified, it can remove the statute of limitations bar even if accompanied by a refusal to pay.[53] An

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security agreement, and bill of sale executed the same day); *Elsberry Equip. Co.*, 211 N.E.2d at 463, 469-70 (finding a note executed subsequent to contracts to be part of the same transaction because the note was dependent upon events described in the contracts); *Sanden*, 201 N.W.2d at 408 (using a separate document to interpret a promissory note executed one month later because it was part of the same plan for financing the sale of a store); *Kemmler Memorial Found.*, 584 N.E.2d at 696-98 (using a mortgage and other documents executed at the same time as a promissory note to interpret the significance of the term "partner" appearing next to the signature on the note).

46. *See* Merchants Nat'l Bank & Trust Co. v. Professional Men's Ass'n, 409 F.2d 600, 603 (5th Cir. 1969) (holding a contract that preceded a note and security agreement to be part of the same transaction), *cert. denied*, 396 U.S. 1009 (1970); *Sanden*, 201 N.W.2d at 408; *Elsberry Equip. Co.*, 211 N.E.2d at 469-70.

47. *See Kucel*, 813 F.2d at 71; Geyer v. First Ark. Dev. Fin. Corp., 434 S.W.2d 301, 302-03 (Ark. 1968) (holding that a deed of trust on a house and a promissory note executed the same day are part of the same transaction); *Kemmler Memorial Found.*, 584 N.E.2d at 696-98.

48. Texas Export Dev. Corp. v. Schleder, 519 S.W.2d 134, 138 (Tex. Civ. App. 1974) (holding that the maker of a note could not argue that the intent of an oil royalties contract was to satisfy the debt on a note when the contract did not refer to the note, even though the contract was executed the same day as the note); *see also* ANDERSON, *supra* note 44, § 3-119:7.

49. *See* MD. CODE ANN., COM. LAW I § 3-119 cmt. 3 (1992).

50. Potterton v. Ryland Group, Inc., 289 Md. 371, 375, 424 A.2d 761, 763 (1981); Doughty v. Bayne, 222 Md. 361, 364, 160 A.2d 609, 611 (1960).

51. *Potterton*, 289 Md. at 375, 424 A.2d at 763.

52. *Doughty*, 222 Md. at 365, 160 A.2d at 611.

53. *See* Brosius Dev. Corp. v. City of Hagerstown, 237 Md. 374, 378-80, 206 A.2d 571, 573-74 (1965) (holding that the defendant made an acknowledgement that removed the bar when he said that an unanticipated bill was more than his company could afford to pay, but that he would try to pay it in the future); *Doughty*, 222 Md. at 366-67, 160 A.2d at 612 (holding that the limitations bar was removed when, in conversation with the creditor, the defendant recalled the debt but refused to pay); *see also* Ronald M. Naditch, Note, *Sufficient Acknowledgment of Indebtedness to Remove Bar of Statute of Limitations*, 21 MD. L. REV. 166, 168-69 (1961).

acknowleedgment can occur after the statute of limitations has run,[54] or before limitations run, in which case the acknowledgement tolls the statute of limitations and establishes a new date from which it will run.[55]

3. The Court's Reasoning.—In *Jenkins,* the court found the validity of Karlton's claim for relief dependent upon when the statute of limitations began to run on the demand note.[56] By invoking the parol evidence rule to exclude evidence of the conversations between Jenkins and Karlton, and by dismissing Karlton's argument that the June 1985 letter was an acknowledgement, the court concluded that Karlton's claim was barred by the statute of limitations.[57]

The court began its analysis by finding that the loan under discussion was clearly a negotiable instrument to which the U.C.C., as adopted by Maryland, applied.[58] As the court explained, a demand note under section 3-108 is one that is "'payable at sight or on presentation' or one 'in which no time for payment is stated.'"[59] Under section 3-122, a cause of action accrues on the date of such notes.[60]

The court first rejected Karlton's argument that the case fit into the exception established in *Blick.*[61] In *Blick,* the court found the terms of the note to indicate that the parties did not intend a cause of action to accrue until conditions had been met.[62] In *Jenkins,* the Court of Special Appeals agreed with Karlton and held that action on the note was not barred by the statute of limitations.[63] In reversing, the Court of Appeals reasoned that because bringing Karlton's note

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54. *See* James v. Thurn, 265 Md. 501, 505, 290 A.2d 490, 492 (1972); *Doughty,* 222 Md. at 364-65, 160 A.2d at 611; Nardo v. Favazza, 206 Md. 122, 128, 110 A.2d 676, 679 (1955).

55. *Potterton,* 289 Md. at 378, 424 A.2d at 765; *see also Brosius Dev. Corp.,* 237 Md. at 380, 206 A.2d at 574 (reasoning that the court need not find when the cause of action accrued because an acknowledgement was made within three years of the suit).

56. *See Jenkins,* 329 Md. at 513, 620 A.2d at 896.

57. *Id.* at 532, 620 A.2d at 905.

58. *Id.* at 517-19, 620 A.2d at 898-99. The court reviewed § 3-104, *see supra* note 25, which lists the necessary elements of a negotiable instrument, and § 3-112, which pertains to additional terms that do not affect negotiability. *Jenkins,* 329 Md. at 520, 620 A.2d at 899. It rejected Karlton's argument that the note's sum was rendered uncertain by allowing for collection of attorney fees. *Id.* at 519-20, 620 A.2d at 899. The court stated that such provisions will not make a demand note due at a later time. *Id.* at 524-25, 620 A.2d at 901.

59. *Id.* at 518, 620 A.2d at 898 (quoting MD. CODE ANN., COM. LAW I § 3-108 (1992)).

60. *Id.*; *see* MD. CODE ANN., COM. LAW I § 3-122 (1992); *see also supra* note 25 (outlining the pertinent parts of the statute).

61. *Jenkins,* 329 Md. at 521-26, 620 A.2d at 900-02; *see supra* notes 29-32 and accompanying text (discussing *Blick*).

62. Blick v. Cockins, 131 Md. 625, 631, 102 A. 1022, 1024 (1917).

63. *See* Karlton v. Jenkins, 86 Md. App. 556, 559, 587 A.2d 580, 581 (1991).

within the exception of *Blick* required examining the "purpose and circumstances" surrounding the note, Karlton's claim must be evaluated under the parol evidence rule.[64] Following the objective law of contracts,[65] the court found that, because the note was "clear and unambiguous" on its face, parol evidence concerning the conversations between Karlton and Jenkins regarding the note were not admissible to modify the terms of the original agreement.[66]

The court drew a parallel to *Harris & Harris v. Tabler*[67] to support its position that the note was facially unambiguous.[68] In *Harris & Harris*, the payee was barred from recovery by the statute of limitations because the note, which stated no time for payment, was found to be a demand note and therefore due at the time of issue.[69] While there was evidence that neither party intended the note to be due on demand,[70] the *Harris & Harris* court held that a note without a due date is not facially ambiguous, but a "straight" demand note about which parol evidence as to the parties' intentions cannot be admitted.[71] The *Jenkins* court did not consider the two cases cited by Karlton in which courts allowed extrinsic evidence to alter the usual rule regarding demand notes.[72]

The *Jenkins* court then turned to the significance of the letter of June 14, 1985, which, four months after Jenkins executed the note, confirmed the parties' understanding that Karlton would not demand payment for at least one year.[73] In considering its relevancy, the court noted section 3-119's allowance of separate written agreements modifying or affecting the negotiable instrument if they are executed as

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64. *Jenkins*, 329 Md. at 523, 620 A.2d at 900-01. To demonstrate the applicability of the parol evidence rule in this context, the court cited U.C.C. § 1-103 and Official Comment 1, which recognizes "the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act." *Jenkins*, 329 Md. at 523, 609 A.2d at 900-01 (quoting U.C.C. § 1-103 cmt. 1).

65. *Id.* at 525, 620 A.2d at 901.

66. *Id.* at 526, 620 A.2d at 902.

67. 348 S.E.2d 241 (Va. 1986). Jenkins brought this case to the court's attention. Brief for Petitioner at 8.

68. *Jenkins*, 329 Md. at 524, 620 A.2d at 901.

69. *Harris & Harris*, 348 S.E.2d at 243.

70. *Id.* at 242-43.

71. *Id.* at 243.

72. *See* Brief for Respondent at 7-8; *see also supra* notes 33-36 and accompanying text (discussing McRae v. Smith, 282 S.E.2d 676 (Ga. App. 1981) and DiBattista v. Butera, 244 A.2d 857 (R.I. 1968), cited by Respondent).

73. *Jenkins*, 329 Md. at 526, 620 A.2d at 902.

part of the same transaction.[74] It then, for the first time, proceeded to define the phrase "part of the same transaction" for the purposes of section 3-119.[75]

The court began by identifying a number of cases from other states in which section 3-119 had been used to interpret promissory notes.[76] Courts have found documents to form part of the same transaction as a promissory note in a variety of circumstances including when the documents do not refer to one another,[77] were not executed at the same time,[78] or neither refer to one another nor were executed at the same time.[79] The court then concluded that

> the note and the separate written agreement are part of the same transaction even when they have not been executed together, if the transaction cannot be understood without interpreting them together. . . . To be a part of the same transaction, the separate written agreement, whether or not it was executed at the same time, earlier than, or subsequent to the note, must be substantially relevant to understanding the transaction out of which the note arose.[80]

Thus, the court adopted a holistic approach that focuses on relevancy rather than the technicalities of the timing of the documents or whether they refer to each other.[81] The court cautioned, however, that the writing cannot contradict the note because "the mere existence of a separate written agreement, arguably affecting or modifying

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74. *Id.* Karlton did not use § 3-119 to support any of his arguments, but Jenkins asserted that under § 3-119, the letter could not vary the terms of the original note because it was not part of the same transaction. Brief for Petitioner at 6-7.

75. *Jenkins*, 329 Md. at 526-29, 620 A.2d at 902-03. The court had applied the provision in Foreman v. Melrod, 257 Md. 435, 263 A.2d 559 (1970). In *Foreman*, the court excluded parol evidence to vary the terms of a note because the parol evidence, which arguably would have released the maker from liability, contradicted a collateral security agreement that the court found to be part of the same transaction. *Id.* at 445, 263 A.2d at 564. The note and security agreement at issue in the case were executed at the same time and the note referred to the security agreement. *Id.* at 438, 263 A.2d at 560. Other than *Foreman*, *Jenkins* was the court's first consideration of § 3-119.

76. *Jenkins*, 329 Md. at 527-28, 620 A.2d at 903 (citations omitted).

77. *See* Merchants Nat'l Bank & Trust Co. v. Professional Men's Ass'n, Inc., 409 F.2d 600, 603 (5th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); Reese v. First Mo. Bank & Trust Co., 664 S.W.2d 530, 533, 535 (Mo. App. 1983).

78. *See Merchants Nat'l Bank & Trust Co.*, 409 F.2d at 603; Elsberry Equip. Co. v. Short, 211 N.E.2d 463, 470 (Ill. App. 1965); Sanden v. Hanson, 201 N.W.2d 404, 408 (N.D. 1972).

79. *See Merchants Nat'l Bank & Trust Co.*, 409 F.2d at 603.

80. *Jenkins*, 329 Md. at 528, 620 A.2d at 903.

81. To make this point clear, the court cited Texas Export Dev. Corp. v. Schleder, 519 S.W.2d 134 (Tex. Civ. App. 1974), a case in which documents were executed at the same time, but were not found to be part of the same transaction. *Jenkins*, 329 Md. at 528, 620 A.2d at 903.

the note, is not sufficient [to find them part of the same transaction] . . . ."[82] Therefore, if there is a contradiction between the separate documents, "the note may be held to stand on its own feet and not be affected by the contradiction."[83] As a result, the court held that the test is whether the separate writing was "intended to and, in fact, did modify the note."[84]

Applying this definition to the facts of the case, the court held that while the June letter "clearly affect[ed] the note[,] . . . it [did] not purport to modify the terms and conditions of the note."[85] The court reasoned that because the language of the letter reiterated that the original note *was* a demand note,[86] it confirmed the terms of the original note as well as Karlton's agreement to forgo demand for a period of time.[87]

Finally, the court addressed Karlton's argument that the letter was an acknowledgement "of an unconditional promise by Jenkins to pay his pre-existing debt to Karlton if demand was made after February 15, 1986," and that therefore, the statute of limitations did not begin to run until February 15, 1986.[88] The court recognized that "[a]n acknowledgement sufficient to remove the bar of limitations need not expressly admit the debt, it need only be consistent with the existence of the debt."[89] The court also recognized that an acknowledgement that occurs prior to the running of the statute of limitations "both tolls the running of limitations and establishes the date of the acknowledgment as the date from which the statute will . . . run."[90] It nevertheless rejected Karlton's argument,[91] refusing to recognize February 15, 1986, as the date on which the statute of limitations would begin to run.[92] The court also refused to recognize the date of the letter—June 14, 1985—as the date on which the statute of limitations would begin to run,[93] adding that even if it found the June 14, 1985 letter to be an acknowledgement, the suit would be barred because

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82. *Jenkins*, 329 Md. at 529, 620 A.2d at 903.
83. MD. CODE ANN., COM. LAW I § 3-119 cmt. 3 (1992).
84. *Jenkins*, 329 Md. at 529, 620 A.2d at 904.
85. *Id.*
86. *Id.*
87. *Id.* at 530, 620 A.2d at 904.
88. *Id.* at 530-32, 620 A.2d at 904-05; *see* Brief for Respondent at 10-13.
89. *Jenkins*, 329 Md. at 531, 620 A.2d at 904.
90. *Id.*, 620 A.2d at 905.
91. *Id.* at 532, 620 A.2d at 905.
92. *Id.*
93. *Id.* at 531-32, 620 A.2d at 905.

the statute of limitations would have expired on June 14, 1988, well before September 26, 1988, the date on which Karlton filed suit.[94]

4. Analysis.—In *Jenkins,* the court organized its analysis around the two pieces of extrinsic evidence related to the note: the conversation between Karlton and Jenkins and the follow-up letter of June 14, 1985. The court invoked the parol evidence rule to exclude evidence of the conversation and analyzed the letter under section 3-119 and the theory of acknowledgement.

Consistent with Maryland law, the court barred admission of parol evidence to vary the terms of the note because it found that the discussion during which Karlton said "pay me back when you can" contradicted the written terms of the note, which clearly stated it was payable on demand.[95] In its analysis of the admissibility of evidence of the conversation, the court also clarified the circumstances under which a note may be excepted from the general rule that a note payable on demand is due on execution. In a footnote, the court cited cases in which other courts have considered the intentions of the parties when interpreting terms of notes.[96] It found that only when the express language of a note is contradictory so as to destroy the negotiability of the note, have courts admitted extrinsic evidence as to the parties' intentions.[97]

Moreover, the court suggested that its decisions in *Weedon* and *Blick* were based on similar reasoning.[98] It interpreted those decisions to mean that an instrument may be excepted from the general rule when it is contradictory on its face or expresses an intention that the promissory note not be due on demand.[99] In both *Weedon* and *Blick,*

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94. *Id.* at 532, 620 A.2d at 905.

95. *Id.* at 514, 620 A.2d at 896.

96. *Id.* at 522 n.6, 620 A.2d at 900 n.6.

97. *Id.* In such cases, courts have found that the note was to be paid within a "reasonable time" of demand and, therefore, a cause of action accrues at the time of demand, not execution. *Id.*

98. *See id.* at 521, 620 A.2d at 899; *see also supra* notes 27-32 and accompanying text (discussing *Weedon* and *Blick*).

99. In *Blick,* the express terms of the note were "wholly inconsistent with the theory that it was intended to become due and payable from the time of its delivery." *Jenkins,* 329 Md. at 521, 620 A.2d at 899 (citing Blick v. Cockins, 131 Md. 625, 630-31, 102 A. 1022, 1024 (1917)).

The Court of Special Appeals, however, cited language in *Blick* indicating that consideration of the parties' intentions apparent from the "purposes and circumstances of the transaction" is applicable. Karlton v. Jenkins, 86 Md. App. 556, 558, 587 A.2d 580, 581 (1991) (citing *Blick,* 131 Md. at 630, 102 A. at 1024). This use of *Blick* ignored the larger context in which the exception in *Blick* was created and the fact that an unambiguous writing existed in *Jenkins.*

the written instruments contained contradictions.[100] In contrast, Karlton's demand note was clear on its face.[101]

Likewise, in recent cases in which courts have declared demand notes not due on execution, the writings were ambiguous.[102] In both *McRae* and *DiBattista*, for example, no clear writing existed.[103] These cases can be contrasted with *Harris & Harris*, in which a note that had no due date was held to be a demand note due when issued because the face of the note did not contain a contradiction.[104] The *Harris & Harris* court strictly applied section 3-108 of the U.C.C., which states that a note without a due date is due on execution.[105] In evaluating Karlton's claim, the *Jenkins* court found the facts of the case to resemble those of *Harris & Harris* rather than the cases in which an exception was allowed.[106]

The court's selection of cases and reading of *Weedon* and *Blick* stemmed from its strong preference for deciding the case based on a strict application of the parol evidence rule and the U.C.C.[107] Its reversal of the Court of Special Appeals was an opportunity to affirm the importance of adhering to the U.C.C.[108]

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100. *See supra* notes 27-32 and accompanying text (discussing *Weedon* and *Blick*).

101. *Jenkins*, 329 Md. at 525-26, 620 A.2d at 902.

102. *See* McRae v. Smith, 282 S.E.2d 676, 677 (Ga. App. 1981) (holding that a loan made by oral agreement with the understanding that it would be paid in a reasonable time "when he could do so" is due on actual demand); Richman v. Kauffman, 48 A.D.2d 988 (N.Y. App. Div. 1975) (holding that a demand note containing conditional language was not due until the condition was met); DiBattista v. Butera, 244 A.2d 857, 859 (R.I. 1968) (holding that a written instrument that says it is "to be paid at any time," is due on actual demand).

103. *See supra* notes 33-37 and accompanying text.

104. Harris & Harris v. Tabler, 348 S.E.2d 241 (Va. 1986); *see supra* notes 67-71 and accompanying text (discussing *Harris & Harris*).

105. *Harris & Harris*, 348 S.E.2d at 243.

106. *Jenkins*, 329 Md. at 524, 620 A.2d at 901.

107. The Official Comment to § 3-118, entitled "Ambiguous terms and rules of construction," states:

> The purpose of this section is to protect holders and to encourage the free circulation of negotiable paper by stating rules of law which will preclude a resort to parol evidence for any purpose except reformation of the instrument. Except as to such reformation, these rules cannot be varied by any proof that any party intended the contrary.

MD. CODE ANN., COM. LAW I § 3-118 cmt. 1 (1992).

108. The court cited § 1-102 of the Commercial Law Article, which explains that the purpose of the U.C.C. is "[t]o simplify, clarify and modernize the law governing commercial transactions" and "[t]o make uniform the law among the various jurisdictions." *Jenkins*, 329 Md. at 518, 620 A.2d at 898 (quoting MD. CODE ANN., COM. LAW I § 1-102(2)(a) (1992)). According to the court, the U.C.C.'s purpose is "to create a guide for commercial transactions under which businessmen may predict with confidence the results of their dealings." *Jenkins*, 329 Md. at 518, 620 A.2d at 898 (citing *In re* Automated Bookbinding Serv., Inc., 471 F.2d 546, 552 (4th Cir. 1972).

The court's decision that the June 1985 letter did not modify the original note was based on a peculiar application of section 3-119 of the Commercial Law Article.[109] An examination of the section 3-119 cases cited by the court reveals that the types of writings commonly analyzed under section 3-119 are qualitatively different from those presented in *Jenkins*. They involve multifaceted, complex transactions of sales of goods or land in which the note plays one of several parts.[110] In these cases, the separate writings have an independent purpose apart from any effect they may have on the promissory note.[111] The court's analysis in *Jenkins* of a letter that was written four months after the note for the sole purpose (arguably) of clarifying it stands out as unusual.

Furthermore, it is not entirely clear that section 3-119 applies to subsequent writings. While the *Jenkins* court stated that documents can be executed "subsequent" to the note under section 3-119,[112] this conclusion is not born out by the language of the Code.[113] Moreover, none of the eleven cases the court cited to demonstrate the application of section 3-119 involved a separate writing executed after the note.[114]

The court saw in *Jenkins* an opportunity to define the meaning of "same transaction" in section 3-119. Ironically, its discussion and application of section 3-119 are somewhat confusing. Although the court stated that a separate document is part of the same transaction as the note "if the transaction cannot be understood without interpreting them together" and that the separate writing "must be substantially relevant to understanding the transaction out of which the

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109. *See Jenkins*, 329 Md. at 526, 620 A.2d at 902.

110. *See supra* notes 44-50.

111. *See id.*

112. *Jenkins*, 329 Md. at 528, 620 A.2d at 903 ("To be a part of the same transaction, the separate written agreement [may be] executed at the same time, earlier than, or subsequent to the note . . . .").

113. *See supra* note 42 (quoting § 3-119).

114. Six of the cases involved writings executed at the same time as the note. *See* Kucel v. Walter E. Heller & Co., 813 F.2d 67 (5th Cir. 1987); Geyer v. First Ark. Dev. Fin. Corp., 434 S.W.2d 301 (Ark. 1968); Foreman v. Melrod, 257 Md. 435, 263 A.2d 559 (1970); Kemmler Memorial Found. v. 691/733 E. Dublin-Granville Rd. Co., 584 N.E.2d 695 (Ohio 1992); Reese v. First Mo. Bank & Trust Co., 664 S.W.2d 530 (Mo. App. 1983); Texas Export Dev. Corp. v. Schleder, 519 S.W.2d 134 (Tex. Civ. App. 1974). Five involved separate writings executed prior to the note. *See* Merchants Nat'l Bank & Trust Co. v. Professional Men's Ass'n, 409 F.2d 600 (5th Cir. 1969); Hauser v. Western Group Nurseries, Inc., 767 F. Supp. 475 (S.D.N.Y. 1991); Elsberry Equip. Co. v. Short, 211 N.E.2d 463 (Ill. App. 1965); Sanden v. Hanson, 201 N.W.2d 404 (N.D. 1972); McPherson v. Longview United Pentecostal Church, Inc., 540 S.W.2d 424 (Tex. Civ. App. 1976).

note arose,"[115] it did not apply those rules in the case.[116] Instead, it applied a narrower test dependent upon whether the letter "intended to and, in fact, did modify the note."[117] The court concluded that while Karlton's letter "clearly affect[ed] the note," it did not modify it.[118] Thus, it appears that the court refused to declare the letter part of the same transaction solely because it did not "modify" the note.

Thus, the test that emerged from *Jenkins* is unclear and uninstructive. The court did not, for example, identify a method for determining whether an instrument has been modified. In fact, it left its distinction between a separate writing that affects a note and one that modifies a note wholly unexplained. All that is clear from the court's discussion is that the separate writing cannot contradict the note and still be part of the same transaction and that the time of the writing's execution and whether it refers to the note may be immaterial.[119]

The court's test is also tautological. If documents are part of the same transaction, then according to section 3-119, they may modify or affect the instrument.[120] The decision as to whether a document modifies a note therefore should follow the decision regarding whether it formed part of the same transaction. By defining "same transaction" by whether the separate writing modifies the note, the *Jenkins* court did little to clarify the term.

The court actually came very close to granting Karlton relief. It could simply have ignored the letter under the parol evidence rule. Instead, it entertained a discussion of it under section 3-119—an unusual method by which to analyze such evidence and one that justifiably could have been omitted. Furthermore, based on the court's indication that the documents must be mutually dependent,[121] the court could have ruled that the letter was not part of the same transaction because the note stood on its own. It instead declared that the letter affected the note.[122] The court nevertheless refused to award relief because it saw a contradiction between the letter and the note.[123]

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115. *Jenkins*, 329 Md. at 528, 620 A.2d at 903.

116. While Karlton's letter would fail under both of these standards, the court did not evaluate the letter in this sense.

117. *Id.* at 529, 620 A.2d at 904.

118. *Id.*

119. *See supra* text accompanying notes 76-83.

120. *See supra* note 42 (quoting § 3-119).

121. *Jenkins*, 329 Md. at 528, 620 A.2d at 903.

122. *Id.* at 529, 620 A.2d at 904.

123. If the court had found the letter a part of the same transaction, the note as affected by the letter would have contradicted the original terms of the note. The court then could have followed the exception established in *Blick* and admitted parol evidence as to when the parties' intended the note to be due. *See supra* text accompanying notes 29-32. The

Whether documents contradict one another, however, has not been the focus of other analyses under section 3-119 and is not entirely relevant to complex transactions to which section 3-119 have been applied.[124] As the court in *Reese v. First Missouri Bank & Trust Co.*[125] pointed out, courts must "harmonize" documents that are part of the same transaction, not preclude them as the *Jenkins* court did.[126]

The court's treatment of Karlton's acknowledgement argument evidences its view that acknowledgement is not a theory under which relief should be sought in this context. The court traditionally has taken a relatively liberal view toward acknowledgements,[127] and it seemed in this case to accept the letter as an acknowledgement of debt by Jenkins.[128] Thus, it would not have been inconceivable for the court to have adopted Karlton's claim that the acknowledgement established as a new due date the future date expressed in the letter. Instead, it rejected the argument simply as a "new wrinkle" in the use of acknowledgements that it would not accept.[129] In so ruling, the court emphasized that Karlton was attempting to use acknowledgement theory to confirm an obligation "*under the original note.*"[130] The court presumably found it inappropriate under an acknowledgement theory to invoke a due date expressed in a different document, *i.e.*, the letter, when no subsequent contract was alleged.[131]

Finally, it is worth noting that the last footnote of the decision indicates that the court would have preferred to treat the letter as a novation—a substitute for the note[132]—or as a modification of the note, changing it to one due at a definite time under section 3-

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court's concern with contradiction was based on the statement in the Official Comment to § 3-119 that if there is an "outright" contradiction between the documents, the note may stand on its own. MD. CODE ANN., COM. LAW I § 3-119 cmt. 3 (1992).

124. *See* Reese v. First Mo. Bank & Trust Co., 664 S.W.2d 530 (Mo. App. 1983); Kemmler Memorial Found. v. 691/733 E. Dublin-Granville Rd. Co., 584 N.E.2d 695 (Ohio 1992).

125. 664 S.W.2d 530 (Mo. App. 1983).

126. *Id.* at 535 (finding that although the note was clear on its face, other writings involved in the transaction rendered it ambiguous).

127. *See supra* note 53 and accompanying text.

128. *See Jenkins*, 329 Md. at 532, 620 A.2d at 905.

129. *Id.* at 531, 620 A.2d at 905.

130. *Id.* at 532, 620 A.2d at 905.

131. *See id.*

132. A novation is a new contract made with the intent to replace a contract already in existence. "It 'contains four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the validity of such new contract, and (4) the extinguishment of the old contract, by the substitution of the new one." I.W. Berman Prop. v. Porter Bros., 276 Md. 1, 5, 344 A.2d 65, 70 (1975) (citations omitted).

109(1)(d) of the Commercial Law Article.[133] While the court expressed no view on the outcome of the case if suit had been brought on the letter under a theory of novation or modification, it indicated that similar cases should be brought under those theories in the future.[134]

5. Conclusion.—Jenkins presented a relatively straightforward case. Karlton brought suit on a demand note more than three years after it was issued. Because it was clear on its face, evidence could not be admitted to alter it, so Karlton's claim was barred by the statute of limitations. The court, however, clarified Maryland law on several issues. In refusing to extend the statute of limitations, it rejected three different arguments: (1) that the note should be excepted from the general rule regarding due dates of demand notes, (2) that the letter could modify the due date under section 3-119, and (3) that an enhanced view of the letter as an acknowledgement should be applied to delay the due date.

In addition, some of the court's discussion was instructive for practitioners. First, the court stressed that the exception to the rule that demand notes are due upon issue is a narrow one and only applies when the note's due date is ambiguous. Second, it affirmed that the statute of limitations runs from the date of the acknowledgement and not from any expressed due date it may contain. Finally, the court suggested that while subsequent writings that arguably affect a note should not be used to reinterpret a note clear on its face, they may be viewed as a modification or a novation.

It is not clear what lessons can be derived from the court's analysis under section 3-119. By applying it to a situation that is not typical of its use, the court broadened the statute into something like a parol evidence rule for subsequent writings. The court's test for whether a separate writing is part of the same transaction, however, was not particularly helpful. *Jenkins* was not the best case from which to develop a same transaction test because it did not involve the numerous and complex documents usually under evaluation when section 3-119 is implicated.

JESSICA L. DRANGEL

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133. *Jenkins*, 329 Md. at 532 n.8, 620 A.2d at 905 n.8. Section 3-109 provides in pertinent part: "(1) An instrument is payable at a definite time if by its terms it is payable: (a) On or before a stated date or at a fixed period after a stated date . . . ." MD. CODE ANN., COM. LAW I § 3-109 (1992).

134. *See Jenkins*, 329 Md. at 531 n.8, 620 A.2d at 905 n.8.

III. CONSTITUTIONAL LAW

A. *Upholding the Constitutionality of Maryland's Drug-Free School Zone Statute*

In *Dawson v. State*,[1] the Court of Appeals rejected a substantive due process challenge to the Maryland drug-free school zone statute, which makes it a felony to manufacture, distribute, or possess with intent to distribute a controlled dangerous substance within 1000 feet of an elementary or secondary school.[2] Applying a rational basis test, the court held that the statute is rationally related to the General Assembly's legitimate interest in protecting children from the ravages of drugs, even when applied to drug transactions that take place outside the presence of children.[3] The *Dawson* decision, which focuses on the intent of the General Assembly and on decisions from other jurisdictions,[4] indicates that the Maryland drug-free school zone statute is immune from all future constitutional challenges.

1. The Case.—On September 6, 1990, Sergeant French, Corporal Taylor, and Deputy Galbreath of the Harford County Sheriff's Department were conducting a covert drug investigation in Aberdeen.[5] While driving along East Belair Avenue in an unmarked car, the officers observed a group of people congregated near a wall that paralleled the road.[6] As they passed, a male sitting on the wall motioned to the car.[7] Corporal Taylor made a U-turn and stopped the car across from where the man sat.[8]

The man crossed the street and approached the unmarked car.[9] After a brief discussion, he produced a clear plastic packet containing a quarter-gram of cocaine from a Newport cigarette pack.[10] In return, Corporal Taylor handed him twenty-five dollars.[11] The seller, who declined to give his name, told Taylor that he always sat on the wall and

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1. 329 Md. 275, 619 A.2d 111 (1993).
2. MD. ANN. CODE art. 27, § 286D (1992).
3. *Dawson*, 329 Md. at 287, 619 A.2d at 117.
4. *Id.* at 285-90, 619 A.2d at 116-18.
5. *Id.* at 279, 619 A.2d at 113.
6. *Id.*
7. *Id.* The man was identified at trial as Stacey Eugene Dawson. *Id.* at 282, 619 A.2d at 114.
8. *Id.* at 279, 619 A.2d at 113.
9. *Id.*
10. *Id.*
11. *Id.*

that Taylor should look for him if he wanted more cocaine.[12] At trial, Taylor and French testified that the transaction, which occurred within 1000 feet of Halls Cross Elementary School, lasted about sixty seconds.[13] Although the transaction took place in an unlit area, both officers also testified that they did not have any trouble seeing the seller.[14]

After leaving the scene, Corporal Taylor met with Officer Osborn, a uniformed officer with the Aberdeen Police Department.[15] Taylor provided Osborn with a description of the seller[16] and the location of the sale.[17] Within minutes, Osborn and another officer arrived at the scene of the transaction.[18] Upon seeing the police approach, the majority of the group congregated near the wall dispersed.[19] Two men remained, however; one of them matched Taylor's description of the seller.[20] At Officer Osborn's request, the man identified himself as Stacey Eugene Dawson.[21] Officer Osborn testified that he neither searched[22] nor arrested Dawson that evening.[23]

The Harford County Grand Jury subsequently indicted Dawson for distribution of cocaine and distribution of cocaine within 1000 feet of an elementary school.[24] Dawson was tried by a jury and convicted on both counts in the Harford County Circuit Court.[25] He appealed to the Court of Special Appeals, but the Court of Appeals issued a writ of certiorari before the Court of Special Appeals could hear the case.[26]

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12. *Id.*

13. *Id.*

14. *Id.* at 282, 619 A.2d at 114.

15. *Id.* at 280, 619 A.2d at 113.

16. Taylor described the seller as a 5'7" tall, 175 pound black male wearing acid washed jeans, a white T-shirt, and a red baseball cap with the word "Oklahoma" written on it in white. In addition, Taylor told Osborn that the cocaine came from a Newport cigarette package. Appellant's Brief at 4 n.2.

17. *Dawson*, 329 Md. at 280, 619 A.2d at 113.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Appellant's Brief at 5. Dawson, on the other hand, testified that Officer Osborn searched him. *Id.* at 6.

23. *Id.* at 5. Although Dawson admitted witnessing the transaction in question, he denied possessing the Newport cigarette pack and selling cocaine to the three men in the car. *Id.* at 6. Officer Osborn testified that his fellow officers arrested the second man, who was found in possession of a Newport cigarette pack, for possession of a controlled dangerous substance. *Id.* at 5.

24. *See Dawson*, 329 Md. at 280, 619 A.2d at 113.

25. *Id.*

26. *Id.* at 278, 619 A.2d at 113.

2. Legal Background.—

a. The Maryland Drug-Free School Zone Statute.—The Maryland drug-free school zone statute makes it an additional and separate felony from other narcotics offenses to manufacture, distribute, or possess with intent to distribute a controlled dangerous substance within 1000 feet of an elementary or secondary school.[27] Section 286D was modeled after the New Jersey drug-free school zone statute,[28] which

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27. MD. ANN. CODE art. 27, § 286D(a)(1) (1992). The statute provides in relevant part:

> (a) A person who manufactures, distributes, dispenses, or possesses with intent to distribute a controlled dangerous substance in violation of § 286(a)(1) of this subheading or who conspires to commit any of these offenses, is guilty of a felony if the offense occurred:
>
> (1) In, on, or within 1,000 feet of any real property owned by or leased to any elementary school, secondary school, or school board, and used for elementary or secondary education, as defined under § 1-101 of the Education Article, regardless of whether:
>
> (i) School was in session at the time of the offense; or
>
> (ii) The real property was being used for other purposes besides school purposes at the time of the offense; or
>
> (2) On a school vehicle as, defined under § 11-154 of the Transportation Article.
>
> (b)(1) A person who violates the provisions of this section, on conviction, shall be subject to the following penalties:
>
> (i) For a first offense, imprisonment for not more than 20 years or a fine of not more than $20,000 or both; or
>
> (ii) For a second or subsequent offense, imprisonment for not less than 5 or more than 40 years or a fine of not more than $40,000 or both. It is mandatory for the court to impose a minimum sentence of 5 years, which may not be suspended, and a person is not eligible for parole during that period, except in accordance with Article 31B § 11 of the Code.
>
> (2) A sentence imposed under this subsection shall be served consecutively to any other sentence imposed.
>
> (c) Notwithstanding any other provision of law, a conviction arising under this section may not merge with a conviction for a violation of § 286 or 286C of this subheading.

Id. § 286D(a)-(c).

28. N.J. STAT. ANN. § 2C:35-7 (West 1993). The New Jersey statute provides in relevant part:

> Any person who violates subsection a. of N.J.S. 2C:35-5, [the general narcotics statute], by distributing dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property . . . is guilty of a crime of the third degree and shall, except as provided in N.J.S. 2C:35-12, be sentenced by the court to a term of imprisonment.

Id. Unlike the Maryland statute, the New Jersey statute provides for an affirmative defense if (1) the prohibited conduct took place in a private residence, (2) no people seventeen or younger were present, and (3) the prohibited conduct did not involve distributing or possessing with intent to distribute drugs for profit. *Id.* The defendant has the burden of establishing this defense by a preponderance of the evidence. *Id.*; *see also* SENATE JUDICIAL

itself was modeled after the Federal Schoolyard Statute.[29] The Maryland statute was enacted "to seal off drug dealers from their potential demand, in this case elementary and secondary school students . . . [and] to establish . . . the psychological mind set of a clean environment."[30]

To assure a "clean environment," the General Assembly included in the statute stringent enforcement provisions. For example, violation of the statute does not depend on whether the offense took place during school hours.[31] Moreover, a conviction under the statute may not be merged with a conviction under section 286, the general narcotics statute,[32] or section 286C, which makes it a felony to hire, solicit, engage, or use a minor to manufacture, distribute, or deliver any controlled dangerous substance in quantities sufficient to indicate an intent to distribute.[33] In addition, courts must impose sentences for the violation of 286D consecutive to any other sentences.[34] Finally, the legislative history of the statute indicates that offenders cannot assert lack of knowledge regarding their proximity to a school as a defense.[35]

b. The Constitutionality of Drug-Free School Zone Statutes.—Due process challenges to the federal schoolyard statute have been rejected by every federal court addressing such challenges.[36] Most defendants challenging the schoolyard statute have argued that it

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PROCEEDINGS COMM., REPORT TO THE GEN. ASSEMBLY OF 1989, BILL ANALYSIS S.B. 289 (1989) (on file at the office of the *Maryland Law Review*) (stating that the bill was based on the New Jersey statute).

29. 21 U.S.C. § 860 (1993). The federal schoolyard statute states in relevant part:

> Any person who violates section 841(a)(1) of this title or section 856 of this title [the general narcotics statutes] by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college or university, or a playground, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is . . . subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense . . . .

Id.

30. *Controlled Dangerous Substances Distribution On or Near School Property—Penalties, 1989: Hearings on S.B. 289 Before the Senate Judicial Proceedings Comm.* (1989) (testimony of Sen. Larry Young).

31. See MD. CODE ANN. art. 27, § 286D(a)(1)(i).

32. *Id.* § 286.

33. *Id.* § 286C.

34. *See id.* § 286D(b)(2)(c).

35. SENATE JUDICIAL PROCEEDINGS COMM., FLOOR REPORT S.B. 289 (1989).

36. *See infra* notes 43-44 and accompanying text.

violates the Due Process Clause by creating an irrebuttable presumption that all drug transactions within 1000 feet of a school are harmful to children.[37] Defendants have claimed that this presumption is not rationally related to the government's interest in protecting children from the dangers of drugs because not all drug transactions within 1000 feet of a school harm children.[38] While such arguments appear to implicate procedural due process concerns in that defendants are not allowed to rebut the presumption by demonstrating that no children were harmed by their particular drug transaction,[39] the argument actually represents a substantive challenge to the statute because the presumption that drug transactions within 1000 feet of a school are harmful to children was established by Congress as a matter of law.[40] As such, any challenge to the presumption is a challenge to the substantive choice made by Congress that all such transactions are harmful to children, whether children are present or not. In other words, this challenge to the statute is a substantive one, attacking the rationality of the legislative presumption.[41]

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37. *See* United States v. Crew, 916 F.2d 980 (5th Cir. 1990) (rejecting defendant's argument that the federal schoolyard statute creates an irrebuttable presumption that is not rationally related to government's interest in protecting children); United States v. Thornton, 901 F.2d 738 (9th Cir. 1990) (rejecting defendant's argument that the federal schoolyard statute creates an irrebuttable presumption that all drug transactions within a school zone are dangerous to children); United States v. Agilar, 779 F.2d 123 (2d Cir. 1985) (rejecting defendant's argument that the federal schoolyard statute offends the Due Process Clause by creating an irrebuttable presumption that every drug transaction within 1000 feet of a school has detrimental effects on schoolchildren), *cert. denied*, 475 U.S. 1068 (1986); United States v. Dixon, 619 F. Supp. 1399 (S.D.N.Y. 1985) (rejecting defendant's argument that the federal schoolyard statute creates an irrebuttable presumption that is not rationally related to Congress's purpose); United States v. Nieves, 608 F. Supp. 1147 (S.D.N.Y. 1985) (rejecting defendant's claim that the federal schoolyard statute's irrebuttable presumption that all drug transactions near a school are harmful to children was irrational as applied to the defendant because the defendant's drug transaction took place outside the presence of school children).

38. *See* cases cited *supra* note 37.

39. *See Thornton*, 901 F.2d at 740 (rejecting the claim that the defendant should be allowed to rebut the presumption); *Nieves*, 608 F. Supp. at 1149 (rejecting the claim that a defendant's due process rights were violated because he was not permitted to introduce evidence that his drug transaction had no effect on children).

40. *See Thornton*, 901 F.2d at 740 (emphasizing that the presumption that drug transactions near schools harm children and thus are deserving of more punishment is one already decided by Congress as a matter of law); United States v. Holland, 810 F.2d 1215, 1221 (D.C. Cir.) (finding that Congress has already decided, as a matter of law, that defendants involved in drug transactions within 1000 feet of a school are deserving of greater punishment), *cert. denied*, 481 U.S. 1057 (1987).

41. The Court of Appeals for the Fifth Circuit has characterized the challenges raised in *Agilar*, *see supra* note 37, and *Holland*, *see supra* note 40, as challenges to the substantive component of the Due Process Clause. United States v. Wake, 948 F.2d at 1422, 1432 (5th Cir. 1991). As Justice Scalia reasoned in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989),

Under the Due Process Clause, courts apply a rational basis test to economic and social legislation that does not infringe on a fundamental right.[42] Courts have unanimously rejected due process challenges to the federal schoolyard statute, determining that "[t]he presumption that narcotics sales in the vicinity of . . . [a] school endanger the students and thus should be subject to stiffer penalties is substantially related to Congress's interest in [protecting children]."[43] The courts have noted that while all drug transactions within 1000 feet of a school may not harm children, it is sufficient that the schoolyard statute represents a rational means of reducing the availability of drugs to schoolchildren.[44]

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irrebuttable presumptions express the substantive policies of the states. *Id.* at 120. Thus, "[t]he assertion that the state has created an 'irrebuttable presumption' . . . [is] nothing more than an assertion that the substance of the state law should be rejected." 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW § 17.6, at 642 (1986).

While the irrebuttable presumption doctrine has been raised as a challenge under the Due Process Clause, a few commentators have suggested that the doctrine actually presents an equal protection challenge. *See generally* Randall P. Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); John M. Phillips, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975). Some of the federal schoolyard cases support this position. For example, defendants have argued in several cases that schoolyard statutes create an irrebuttable and irrational presumption that all drug transactions near a school harm children. *See Thornton*, 901 F.2d at 740; *Holland*, 810 F.2d at 1220. As the *Holland* court reasoned, if defendants, in asserting this argument, are referring to Congress's decision to punish more severely those who engage in drug transactions within 1000 feet of a school than those who engage in drug transactions outside the school zone, then their argument "is simply a restatement of [the] equal protection argument." *Holland*, 810 F.2d at 1221. In this context, the use of the irrebuttable presumption is challenged on the basis of the classifications created by the statute.

42. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Nebbia v. New York, 291 U.S. 502, 525 (1934) (holding that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained").

When fundamental rights are involved, the Court applies strict scrutiny and will only uphold such legislation if it is necessary to achieve a compelling government interest. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

43. United States v. Nieves, 608 F. Supp. 1147, 1149 (S.D.N.Y. 1985). In *Nieves*, the transaction that led to the defendants' arrest occurred two blocks from school property at 4 p.m. *Id.* No children were alleged to have been present during the transaction. *Id.* Nieves argued that, in light of such facts, the presumption that children were harmed was irrational. *Id.*; *see also* United States v. Crew, 916 F.2d 980, 983 (5th Cir. 1990) (holding that the schoolyard statute is constitutional because the presumption that drug transactions near schools harm children is rationally related to Congress's goal of protecting children); *Thornton*, 901 F.2d at 741 (holding that the schoolyard statute does not violate due process); *Agilar*, 779 F.2d at 125-26 (holding that it is rational for Congress, in its efforts to protect children, to increase penalties for those who sell drugs near schools).

44. *See Crew*, 916 F.2d at 983 (holding that the applicability of the schoolyard statute does not depend on the presence of children); *Thornton*, 901 F.2d at 741 (holding that since the statute is a rational means of reducing children's exposure to drugs, it is irrelevant that, in some cases, children are not injured by the transaction); *Agilar*, 779 F.2d at

State courts likewise have rejected substantive due process challenges to drug-free school zone statutes similar to section 286D. In *State v. Rodriguez*,[45] the Superior Court of New Jersey summarily rejected a substantive due process challenge to the New Jersey drug-free school zone statute.[46] The court noted that because "a 'fundamental right' is not involved . . . the legislation will withstand a substantive due process attack since it reasonably relates to a legitimate legislative purpose."[47] Other state courts have entertained due process challenges based on the irrebuttable presumption argument asserted in the federal courts.[48] Like the federal courts, state courts have determined that implicit in the drug-free school zone statutes "is the legislative finding, as a matter of substance and not of presumption, that such transactions are the cause of harm to children."[49] Holding that drug-free school zone statutes need only bear a rational relationship to a legitimate government interest,[50] state courts have upheld these statutes as a rational means to protect children.[51] As the Virginia Supreme Court stated in *Commonwealth v. Burns*, "[there is no] question that [the legislature's] conclusion [that drug transactions occur-

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125-26 (holding that whether or not each drug transaction within 1000 feet of a school harms children, proscribing drugs within the school zone is a rational means of reducing children's access to drugs).

45. 542 A.2d 966 (N.J. Super. Ct. Law Div. 1988).

46. *Id.* at 970.

47. *Id.*

48. State v. Moore, 782 P.2d 497 (Utah 1989) (rejecting defendant's argument that the Utah drug-free school zone statute violated due process by creating an irrebuttable presumption that children will be harmed by drug transactions near schools); Commonwealth v. Burns, 395 S.E.2d 456 (Va. 1990) (reversing the trial court's holding that the Virginia drug-free school zone statute violated due process by creating an irrebuttable presumption that all drug transactions within 1000 feet of a school harm children); State v. Hermann, 474 N.W.2d 906 (Wis. Ct. App. 1991) (rejecting defendant's argument that the Wisconsin drug-free school zone statute violated due process by establishing an irrational, irrebuttable presumption that drug transactions near schools have a special detrimental effect on children).

49. *Burns*, 395 S.E.2d at 459.

50. *See* State v. Burch, 545 So. 2d 279, 284 (Fla. 1989) (holding that the Florida drug-free school zone statute must only satisfy a rationality test); *Hermann*, 474 N.W.2d at 912 (declaring that due process only requires that the means chosen by the legislature bear a reasonable and rational relationship to the purpose of the statute).

51. *See Moore*, 782 P.2d at 502 (holding that the Utah drug-free school zone statute does not violate due process by creating an irrebuttable presumption that children will be harmed by drug transactions near schools); *Burns*, 395 S.E.2d at 459 (holding that the Virginia drug-free school zone statute is rationally related to the state's interest in protecting children, even when the statute is applied to transactions that take place when children are not present); *Hermann*, 474 N.W.2d at 912 (holding that the Wisconsin drug-free school zone statute, which enhances penalties for those convicted of drug transactions near school grounds, bears a reasonable and rational relationship to the deterrence of such activities).

ring near a school pose a threat of harm to children regardless of whether children are present] is rationally related to the Commonwealth's interest in protecting children from such threatened harm."[52]

3. The Court's Reasoning.—On appeal, Dawson challenged the constitutionality of section 286D, asserting that it violated the Due Process Clauses of both the United States Constitution[53] and the Maryland Declaration of Rights.[54] Dawson argued that "there is no real and substantial relationship between the General Assembly's objective of protecting schoolchildren and [section] 286D's imposition of criminal liability without regard to the actual presence of children."[55]

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52. *Burns*, 395 S.E.2d at 459.

53. U.S. CONST. amend. XIV; *see Dawson*, 329 Md. at 282, 619 A.2d at 114-15.

54. Article 24 of the Maryland Declaration of Rights states, in relevant part: "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST. art. XXIV; *see Dawson*, 329 Md. at 282, 619 A.2d at 14-15.

Dawson also asserted on appeal that the State's evidence was insufficient to sustain his distribution convictions. *Id.* at 281, 619 A.2d at 114. He argued that the area where the transaction occurred was poorly lit, that the seller was wearing a hat, that the transaction was of brief duration and that 12 to 15 other people left the scene when Officer Osborn arrived. *Id.* at 282, 619 A.2d at 114. According to Dawson, "the existence of these factors together with the extraordinary nine months between the incident and the officers' in court identification of [him] render[ed] the identification inherently suspect and virtually unbelievable." Appellant's Brief at 12.

Maryland courts use the test established in Jackson v. Virginia, 443 U.S. 307 (1979), to evaluate sufficiency of evidence claims. *See* Colvin v. State, 299 Md. 88, 109, 472 A.2d 953, 964, *cert. denied*, 469 U.S. 873 (1984). In *Jackson*, the Supreme Court held:

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 318-19 (citation omitted). Applying the *Jackson* test, the *Dawson* court focused on the testimony of Sergeant French and Corporal Taylor and noted that both Taylor and French positively identified Dawson as the man who sold them drugs. *Dawson*, 329 Md. at 282, 619 A.2d at 114. The court also considered Officer Osborn's testimony that Dawson met the description that Taylor provided and that Dawson was sitting in the exact spot where Taylor told him to look. *Id.* After reviewing this evidence, the court concluded that "when viewing the evidence in a light most favorable to the State . . . there was sufficient evidence for a rational jury to find that Dawson was the person who sold Taylor the cocaine." *Id.*

55. *Dawson*, 329 Md. at 282-83, 619 A.2d at 115.

In reviewing Dawson's challenge, the court noted that the requirements of due process are satisfied when a statute, as an exercise of the State's police power, "'bears a real and substantial relation to the public health, morals, safety, and welfare of the citizens of this state.'"[56] The court determined that the Maryland drug-free school zone statute would be constitutional if a substantial relationship existed between the provisions and the purpose of the statute.[57] Examining the language and legislative history of the drug-free school zone statute, the court concluded that the General Assembly enacted section 286D as a "preventative measure designed to assure the safety of schoolchildren [by] . . . eliminat[ing] all drug dealing near school grounds on a 24-hour basis."[58]

The court found that the application of section 286D "to all transactions within the 1000 foot perimeter," regardless of whether "[s]chool was in session at the time of the offense,"[59] is substantially related to the General Assembly's goal of protecting schoolchildren.[60] Recognizing that the hours during which schoolchildren congregate near schools cannot be predicted[61] and that areas known as drug markets attract drug dealers and purchasers all day long,[62] the court con-

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56. *Id.* at 283, 619 A.2d at 115 (quoting Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 236, 335 A.2d 679, 683 (1975)). In Maryland, this test is used to determine the constitutionality of statutes that do not infringe upon fundamental interests under the Due Process Clauses of both the Constitution and the Maryland Declaration of Rights. *See* Westchester West No. 2 Ltd. Partnership v. Montgomery County, 276 Md. 448, 454, 348 A.2d 856, 860 (1975). Under this test, anyone challenging the constitutionality of a statute enacted under the State's police powers has the heavy burden of overcoming the presumption of constitutionality by affirmatively establishing the statute's invalidity. Edgewood Nursing Home v. Maxwell, 282 Md. 422, 427, 384 A.2d 748, 751 (1978). This burden is especially heavy when challenging criminal statutes because, as the *Dawson* court recognized, the General Assembly has broad authority to criminalize certain activities. *Dawson*, 329 Md. at 283, 619 A.2d at 115; *see also* Greenwald v. State, 221 Md. 235, 240, 155 A.2d 894, 897 (1960) (reaffirming that the legislature has the power to define criminal offenses and to proscribe criminal penalties, the only limitation being constitutional rights and privileges). Finally, the Court of Appeals has announced that it will not review the wisdom of legislative enactments unless they are not supported by any considerations relating to the public welfare. *See* Maryland Bd. of Pharmacy v. SAV-A-LOT, Inc., 270 Md. 103, 106, 311 A.2d 242, 244 (1973).

57. *Dawson*, 329 Md. at 284, 619 A.2d at 116.

58. *Id.* at 285, 619 A.2d at 116. The court found that the General Assembly, in creating a 24-hour drug-free school zone, sought to decrease children's use of drugs and to insulate children from the direct and indirect effects of drug dealing. *Id.*

59. MD. ANN. CODE art. 27, § 286D(a)(1)(i) (1992).

60. *Dawson*, 329 Md. at 287, 619 A.2d at 117.

61. *Id.* at 286, 619 A.2d at 116. The court noted that children often take part in extracurricular activities, sporting events, and social activities that take place at school after school hours. *Id.*

62. *Id.* Refusing to read the statute narrowly, the court reasoned that the statute's goal of protecting children would not be realized if the protection of the statute ended at the

cluded that the statute's creation of twenty-four hour drug-free school zones "bore a rational relationship to the achievement of the State's legitimate goal of protecting children,"[63] and thus satisfied the requirements of due process.[64]

To support its decision, the court noted that federal courts reviewing the federal schoolyard statute have upheld the application of the statute to drug transactions occurring outside the presence of children.[65] The court also emphasized that every court reviewing similar drug-free school zone statutes has declared them constitutional.[66]

4. Analysis.—The constitutionality of the Maryland drug-free school zone statute presented a case of first impression.[67] By holding that the statute is rationally related to the General Assembly's goal of protecting children from drugs,[68] the court effectively rendered futile not only similar due process challenges, but virtually any future constitutional challenge to the statute.

The *Dawson* decision was amply supported by case law from federal and state courts.[69] As Judge Chasanow noted in the opinion, every court that has reviewed statutes creating twenty-four-hour drug-free school zones has found that they are rationally related to the legitimate goal of protecting children from the dangers associated with drugs and drug dealing.[70] In light of the unanimous precedent from other jurisdictions, Maryland's legitimate interest in the protection of children,[71] the General Assembly's clear intent to create twenty-four-

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close of the schoolday. *See id.* at 288, 619 A.2d at 117-18 (citing United States v. Crew, 916 F.2d 980, 983 (5th Cir. 1990).

63. *Id.* at 287, 619 A.2d at 117.

64. *Id.*

65. *Id.* The court cited United States v. Agilar, 612 F. Supp. 889 (S.D.N.Y. 1985); United States v. Nieves, 608 F. Supp. 1147 (S.D.N.Y. 1985); United States v. Dixon, 619 F. Supp. 1399 (S.D.N.Y. 1985); and United States v. Cunningham, 615 F. Supp. 519 (S.D.N.Y. 1985).

66. *Dawson*, 329 Md. at 288, 619 A.2d at 118 ("[O]ur research has indicated that every court reviewing drug-free school zone statutes has found them to be constitutional."). The court cited both federal and state cases including, United States v. Campbell, 935 F.2d 39 (4th Cir.), *cert. denied*, 112 S. Ct. 348 (1991); United States v. Rowe, 911 F.2d 50 (8th Cir. 1990); United States v. Cross, 900 F.2d 66 (6th Cir. 1990); United States v. Holland, 810 F.2d 1215 (D.C. Cir.), *cert. denied*, 481 U.S. 1057 (1987); State v. Rodriguez, 542 A.2d 966 (N.J. Super. Ct. Law Div. 1988); State v. Moore, 782 P.2d 497 (Utah 1989); Commonwealth v. Burns, 395 S.E.2d 456 (Va. 1990).

67. *See Dawson*, 329 Md. at 278, 619 A.2d at 113.

68. *Id.*

69. *See supra* notes 43-44, 51 and accompanying text.

70. *Dawson*, 329 Md. at 288, 619 A.2d at 118.

71. Dawson agreed that the state has a valid interest in shielding children from the evils of drugs and drug dealing. *Id.* at 282, 619 A.2d at 115.

hour drug-free school zones,[72] and the heavy burden placed on any person raising a substantive due process challenge to a criminal statute,[73] it would have been highly unlikely for the *Dawson* court to have reached a contrary conclusion. While *Dawson* is important because it precludes future substantive due process challenges to section 286D, other issues also are worthy of discussion.

Defendants in other jurisdictions have argued that drug-free school zone statutes violate the Due Process Clause by failing to require that defendants have knowledge of the fact that they are within 1000 feet of a school when the drug transaction takes place.[74] In rejecting this challenge, the Court of Appeals for the Second Circuit noted that while "'criminal offenses requiring no mens rea[75] have a "generally disfavored status"' . . . Congress can dispense with this requirement."[76] In the context of the federal drug-free school zone statute, courts have unanimously rejected this due process challenge, emphasizing that the intent of Congress not to include a *mens rea* requirement in the statute was clear[77] and that the schoolyard statute

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72. *See id.* at 287, 619 A.2d at 117; *see also supra* note 30 and accompanying text.

73. *See supra* notes 42 and 56.

74. *See, e.g.*, United States v. Cross, 900 F.2d 66, 69 (6th Cir. 1990) (rejecting the argument that the federal schoolyard statute violates due process because it does not require the defendant to have knowledge of the fact that a school is within 1000 feet of the drug transaction); United States v. Holland, 810 F.2d 1215, 1222-24 (D.C. Cir.) (rejecting the contention that the federal schoolyard statute violates due process by not requiring the defendants to have knowledge of their proximity to a school), *cert. denied*, 481 U.S. 1057 (1987); State v. Burch, 545 So. 2d 279, 283-84 (Fla. Dist. Ct. App. 1989) (rejecting the claim that the Florida schoolyard statute violates due process by not requiring the government to prove an intent to sell drugs at a location within 1000 feet of a school).

75. The *mens rea* is the element of a crime relating to the defendant's mental state. The state of mind required for a particular crime varies. A statute may require knowledge or intent on the part of the defendant, or it may not require any particular state of mind. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 831-35 (3d ed. 1982) (discussing the concept of *mens rea*).

76. *See* United States v. Falu, 776 F.2d 46, 49 (2d Cir. 1985) (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)). In *Liparota*, the Supreme Court held that the government had to prove that the defendant knew that his acquisition of food stamps was in a manner unauthorized by the statute. *Liparota*, 471 U.S. at 433.

77. *See Holland*, 810 F.2d at 1223 (reasoning that "Congress' heightened interest in protecting children from both the indirect and direct perils of drug trafficking amply supports its decision not to require a showing of *mens rea* of the proximity of a school"); *Cross*, 900 F.2d at 69 (stating that the intent of Congress not to expressly require a *mens rea* is clear); *Falu*, 776 F. Supp. at 50 (finding that a requirement that a defendant know that he is within a school zone would undercut the unambiguous legislative design to dispense with an intent requirement); *Burch*, 545 So. 2d at 283 (finding that requiring a dealer to know that a transaction is within 1000 feet of a school would undermine the clear intent of Congress to create a statute which did not require knowledge of the proximity of a school).

does not criminalize otherwise innocent conduct.[78] In light of the federal precedent and the General Assembly's clear intent to create an offense that does not require defendants to have knowledge of their proximity to a school,[79] it is highly probable that Maryland courts would reject such a *mens rea* challenge.

Defendants also have asserted equal protection challenges to drug-free school zone statutes, arguing that the statutes are both underinclusive and overinclusive and therefore violative of the right to equal protection.[80] Because drug-free school zone statutes do not affect fundamental interests nor implicate suspect classes, courts have applied the rational basis test to this claim[81] and have upheld drug-free school zone statutes after finding that the statutes are rationally

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78. *See Holland*, 810 F.2d at 1223 (stating that the drug-free school zone statute criminalizes a type of conduct that reasonable people know is subject to strict regulation); *Cross*, 900 F.2d at 69 (noting that since the statute only applies to people who have violated the general federal narcotics statute, which requires the defendant to knowingly or intentionally distribute drugs, the statute does not criminalize otherwise innocent activity); *Falu*, 776 F.2d at 50 (highlighting that the federal drug-free school zone statute does not criminalize otherwise legal conduct since the statute incorporates the general narcotics statute, which contains a *mens rea* requirement).

79. *See supra* note 35 and accompanying text.

80. *See* United States v. Crew, 916 F.2d 980, 983 (5th Cir. 1990) (rejecting defendant's argument that the federal schoolyard statute is underinclusive because it does not apply to all locations where children congregate and overinclusive because it applies to transactions among adults); United States v. Thornton, 901 F.2d 738, 739-40 (9th Cir. 1990) (rejecting defendant's assertion that the federal schoolyard statute is both underinclusive, because transactions taking place outside the school zones may harm children, and overinclusive, because transactions within the school zones may not involve children at all).

81. In United States v. Dixon, 619 F. Supp. 1399 (S.D.N.Y. 1985), the defendant argued that "strict scrutiny must be applied to criminal statutes that affect 'vital liberty interests.'" *Id.* at 1401. The defendant relied on Douglas v. California, 372 U.S. 353 (1963), in which the Supreme Court applied strict scrutiny to a statute which denied appellate counsel to indigent defendants. Rejecting the defendant's claim, the *Dixon* court reasoned that "[t]he statute challenged [in *Douglas*] was subjected to strict scrutiny because, by denying the indigent defendants the right to appellate counsel, it impaired a fundamental right." *Dixon*, 619 F. Supp. at 1401. Reasoning that the federal schoolyard statute impairs no fundamental right, the *Dixon* court applied the rational basis test. *Id.* The approach taken by the *Dixon* court is consistent with the approach taken by all courts addressing due process and equal protection challenges to criminal statutes. *See supra* notes 43-44, 50 and accompanying text; *infra* notes 82-85 and accompanying text.

Justice Marshall once stated, "I find it hard to understand why a statute which sends a man to prison . . . should be tested under the same minimal standards of rationality that we apply to statutes regulating who can sell eyeglasses or who can own pharmacies." Marshall v. United States, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting). Several commentators also have criticized the courts for failing to deal adequately with the underlying constitutional issues involved in criminal legislation. *See generally* Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Thomas L. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344 (1977); Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1970-71).

related to the legitimate government interest in protecting children.[82] Some defendants have argued that courts should subject the federal drug-free school zone statute to strict scrutiny because it has a disparate impact on members of racial minorities and thus implicates suspect classes.[83] The courts that have addressed this challenge have unanimously rejected the claim, holding that because there is no proof of a racially discriminatory purpose,[84] "[i]t is . . . sufficient for equal protection purposes that the statute . . . bears a rational relationship to a legitimate government interest."[85]

In treating criminal legislation in the same manner that they treat ordinary economic legislation, the courts have all but ignored the fundamental liberty interests of defendants. Such oversight is surprising

> because of the obvious concern of the Constitution to safeguard the use of the method of the criminal law—especially . . . on the procedural side—and the concern of the courts themselves . . . to give vitality to the procedural guarantees. What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?

Hart, *supra*, at 431. A strong argument can be made that there should not only be procedural safeguards, but also greater substantive restraints on the ability of the government to criminalize certain conduct. A criminal statute that strips individuals of their fundamental right to liberty should be subject to a test more stringent than the rational basis test. While some commentators have suggested reevaluating the current tests applied to criminal legislation, *see supra*, Hindes, at 378; *supra*, Packer, at 490, it appears extremely unlikely that the courts will change their approach to criminal legislation any time soon.

82. *See Crew*, 916 F.2d at 984 (rejecting an equal protection challenge because increasing the penalties for selling drugs near schools is rationally related to the legitimate government interest in protecting children); *Thornton*, 901 F.2d at 740 (rejecting an equal protection challenge under the rational basis test); State v. Moore, 782 P.2d 497, 503-04 (Utah 1989) (applying the rational basis test in rejecting an equal protection challenge).

83. *See supra* note 81; *see also* United States v. Agilar, 779 F.2d 123, 126 (2d Cir. 1985) (summarily dismissing an argument that more minorities live within 1000 feet of schools than do nonminorities and that therefore the statute violates the Equal Protection Clause because of an alleged disproportionate impact on racial minorities); United States v. Nieves, 608 F. Supp. 1147, 1150 (S.D.N.Y. 1985) (rejecting the argument that the federal schoolyard statute should be subjected to strict scrutiny because the statute's enhanced penalties have a greater impact on racial minorities who represent a higher percentage of the population in densely populated urban areas where the number of schools is greater than in suburban and rural areas).

84. In Washington v. Davis, 426 U.S. 229 (1975), the Supreme Court held that the establishment of an equal protection claim attacking a facially neutral law requires the showing of a discriminatory purpose. *Id.* at 240. Under the rule in *Washington*,

> a law, neutral on its face and serving ends otherwise within the power of the government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

Id. at 242.

85. *Dixon*, 619 F. Supp. at 1401; *see also Agilar*, 779 F.2d at 126; *Nieves*, 608 F. Supp. at 1150.

Like the federal courts, Maryland courts would likely apply a rational basis test to either of the above equal protection challenges.[86] Because in Maryland the rational basis test for equal protection is the same as the rational basis test for due process,[87] the holding in *Dawson* dictates the rejection of either of these equal protection challenges.[88]

One further issue worth noting hinges on a question of statutory interpretation. Section 286D, like the federal schoolyard statute and the New Jersey drug-free school zone statute, makes it a crime to "possess[ ] with intent to distribute a controlled dangerous substance . . . within 1,000 feet of any real property . . . used for elementary or secondary education."[89] This provision raises the issue of whether the statute applies to persons who, while possessing drugs within 1000 feet of a school, clearly intend to distribute them at a location outside the school zone.[90] The courts are split on this question. A few federal district courts, looking at the language and legislative history of the federal schoolyard statute, have held that the government must prove an intent to distribute the drugs at a location within 1000 feet of a

86. *See* Attorney General v. Waldron, 289 Md. 683, 704, 426 A.2d 929, 940-41 (1981). In *Waldron*, the Court of Appeals held that the equal protection concepts in the Constitution and the Maryland Declaration of Rights generally mean the same thing and apply in the same manner; "[i]f . . . neither a suspect class nor a fundamental right or interest is implicated, then the traditional equal protection analysis calls forth . . . the 'rational basis test.'" *Id.* at 706-07, 426 A.2d at 942.

87. Department of Transp. v. Armacost, 299 Md. 392, 422, 474 A.2d 191, 206 (1984).

88. The *Dawson* court found that the statute is rationally related to the General Assembly's goal of protecting children. *Dawson*, 329 Md. at 287, 619 A.2d at 117. Consequently, Maryland courts will be compelled to hold that the statute passes the equal protection rational basis test if faced with such a challenge.

89. MD. ANN. CODE art. 27, § 286D(a). For the text of the federal and New Jersey statutes, see *supra* notes 28, 29.

90. *See* United States v. Roberts, 735 F. Supp. 537, 538 (S.D.N.Y. 1990) (determining that the federal schoolyard statute did not apply to a defendant who was caught while boarding a train in Pennsylvania Station in New York City); United States v. Liranzo, 729 F. Supp. 1012, 1013 (S.D.N.Y. 1990) (holding that the federal schoolyard statute did not apply to a defendant who was arrested in the Port Authority bus terminal in New York City, which is within 1000 feet of a school); State v. Ivory, 592 A.2d 205, 211 (N.J. 1991) (holding that New Jersey's drug-free school zone statute applied to a defendant who was arrested while riding his bike through a public park that contained athletic fields leased and used by a school).

school.[91] At least one federal appellate court[92] and a few state courts,[93] however, have reached the opposite conclusion.

In construing section 286D, Maryland courts will look to both the language and purpose of the statute.[94] They will endeavor to "seek out . . . the ends to be accomplished [and] the evils to be redressed by [section 286D]."[95] The language of section 286D indicates a legislative intent to apply the statute to anyone who commits the offense of possession with intent to distribute a controlled dangerous substance within 1000 feet of a school.[96] In addition, as the *Dawson* court noted, the legislative history of section 286D indicates an intent to create

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91. In *Roberts*, *see supra* note 90, the court first looked at the plain meaning of the statute. *Roberts*, 735 F. Supp. at 539. After deeming the language of the statute ambiguous, the court analyzed Congress's intent. *Id.* at 540. The *Roberts* court found that Congress enacted the statute to deter drug distribution around schools and not to establish drug-free zones around schools. *Id.* The ascertainment of this legislative intent along with the court's adherence to the rule of lenity, which dictates that an ambiguity in a statute be resolved in favor of the defendant, led the court to conclude that the statute only applies to those defendants who intend to distribute drugs within the 1000 foot school zone. *Id.* at 543; *see also* United States v. Coates, 739 F. Supp. 146 (S.D.N.Y. 1990) (holding that the federal schoolyard statute does not apply to those who are caught possessing drugs within 1000 feet of a school but intend to distribute the drugs elsewhere); *Liranzo*, 729 F. Supp. at 1012 (holding that the federal statute only reaches those who intend to distribute narcotics at a location within 1000 feet of a school).

92. *See* United States v. Wake, 948 F.2d 1422 (5th Cir. 1991). In *Wake*, the Fifth Circuit stated: "we construe the statute to proscribe possession, within 1,000 feet of a school, of a quantity sufficient to indicate intent to distribute (felony possession)." *Id.* at 1430. In reaching its decision, the court looked to the language and the purpose of the federal schoolyard statute, *id.* at 1430-32, and ultimately concluded that Congress passed the schoolyard statute to create drug-free zones around schools. *Id.* at 1433.

93. *See* Commonwealth v. Roucoulet, 601 N.E.2d 470, 471 (Mass. 1992) (holding that the drug-free school zone statute applied to a defendant possessing drugs within a school zone even if the defendant intended to distribute the drugs elsewhere); *Ivory*, 592 A.2d at 209 (holding that since the statute does not require a showing of an intent to distribute at a particular location, it is irrelevant whether the defendant intended to distribute the drugs at a location within 1000 feet of a school).

94. *See* Morris v. Prince George's County, 319 Md. 597, 603-04, 573 A.2d 1346, 1349 (1990) (stating that while courts always begin the process of statutory construction by focusing on the language of the statute itself, the court's ultimate goal is to seek out the legislative purpose, and this can be done by examining the legislative history of the statute if the language is in some way ambiguous).

95. *Id.*

96. Section 286D states: "A person who . . . possesses with intent to distribute a controlled dangerous substance in violation of § 286(a) . . . is guilty of a felony if the *offense* occurred . . . within 1,000 feet of . . . [a] school." MD. ANN. CODE art. 27, § 286D(a)(1)(1) (1992) (emphasis added). This language, which differs from the language in both the federal schoolyard statute and the New Jersey statute, *see supra* notes 28, 29, suggests that if a defendant is found guilty of the offense of possession with intent to distribute and the defendant is within 1000 feet of a school, the defendant is guilty of violating § 286D. Under such a construction, a defendant's intent to distribute the drugs elsewhere is irrelevant.

drug-free zones around schools.[97] These two factors suggest that Maryland courts would construe section 286D to apply to those defendants who possess, within a school zone, quantities of drugs indicating an intent to distribute, even if it is clear that the defendant does not intend to distribute the drugs within 1000 feet of a school. This conclusion is bolstered by the New Jersey Supreme Court's construction of the New Jersey statute, which served as the model for the Maryland statute. In *State v. Ivory*,[98] the New Jersey court held that the statute applied to a defendant who possessed, within a school zone, quantities of drugs indicating an intent to distribute even though he clearly intended to distribute the drugs at a location outside the school zone.[99]

If the Court of Appeals construes section 286D to apply to those defendants who clearly do not intend to distribute drugs within 1000 feet of a school, the application of section 286D may lead to undesirable results. As at least one federal district court has recognized,

> To posit liability [when it is clear that a defendant had no intent to distribute drugs within 1000 feet of a school] would be to mandate charging a schoolhouse count every time defendants on trains, or any other means of transportation, speed by a school on their way to a narcotics sale.[100]

Applying section 286D in such situations ultimately might subvert its purpose. The New Jersey Superior Court's decision in *State v. Ogar* is illustrative.[101] In *Ogar*, the police had a tip that the defendant was dealing drugs, and they set up surveillance.[102] When the defendant left his location, the police followed him for two miles before stopping him in front of a school.[103] The defendant was charged and convicted under the New Jersey schoolyard statute, and the New Jersey Supreme

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97. *Dawson*, 329 Md. at 287, 619 A.2d at 117.

98. 592 A.2d 205(N.J. 1991).

99. *Id.* at 211. In *State v. Ivory*, the New Jersey Supreme Court upheld the application of New Jersey's drug-free school zone statute to a defendant who was arrested while riding his bike through a park that contained athletic fields used by schools. *Id.* The court stated:

> The first step in determining whether [the New Jersey drug-free school zone statute] has been violated is to see whether [New Jersey's general drug statute proscribing possession with intent to distribute] has been violated. The latter provision does not necessitate that one be shown to intend to distribute within any specific area. . . . After the elements of that offense have been established, one need only take out the tape measure to see if the [drug-free school zone statute] has been violated.

Id.

100. *See* United States v. Coates, 739 F. Supp. 146, 153 (S.D.N.Y. 1990).

101. 551 A.2d 1037 (N.J. Super. Ct. App. Div. 1989).

102. *Id.* at 1039.

103. *Id.*

Court upheld the conviction.[104] Maryland courts should exercise caution before reaching a similar result. The enhanced penalties provided under the school zone statute create an incentive for police departments to wait to arrest known drug dealers until they come within 1000 feet of a school. The desire of police departments to exact stiffer penalties may subvert the intent of the legislature to protect children from drugs and the violence associated with drug dealing.[105]

5. Conclusion.—In *Dawson*, the court precluded further substantive due process challenges to the Maryland drug-free school zone statute by holding that the statute is rationally related to the General Assembly's goal of protecting children from the direct and indirect effects of drugs and drug dealing. The decision is not only notable for this conclusion, but is also important because it indicates the Court of Appeals's willingness to follow, in this area of the law, precedent established in other jurisdictions. Furthermore, the broad language of the *Dawson* opinion suggests that, in all probability, the court will reject any constitutional challenge to the statute.

JAMIE M. ALTER

B. Prohibition of Gender-Based Peremptory Challenges

In *Tyler v. State*,[1] the Court of Appeals held that a prosecutor could not use peremptory challenges[2] to exclude a person from jury service because of that person's gender. In so holding, the court relied on state constitutional law[3] to justify extending the Supreme Court's holding in *Batson v. Kentucky*,[4] which prohibits racially motivated peremptory challenges.

1. The Case.—On the afternoon of December 4, 1990, Jerry Samuel Tyler and Gerald Wynn Eiland encountered James Stanley Bias

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104. *Id.* at 1042.

105. *See* State v. Regan, 564 So. 2d 1208, 1210 (Fla. Dist. Ct. App. 1990) (Altenbern, J., concurring) (arguing that drug-free school zone statutes may induce police departments, seeking to subject drug dealers to stiffer penalties, to conduct undercover operations in school zones, potentially putting children at risk).

1. 330 Md. 261, 623 A.2d 648 (1993).

2. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965).

3. *Tyler*, 330 Md. at 270, 623 A.2d at 653; *see also infra* notes 14, 76-83 and accompanying text.

4. 476 U.S. 79 (1986).

III at a mall.[5] Tyler argued with Bias, and either Tyler or Eiland shot Bias shortly afterwards.[6] At trial, the State used sixteen of its twenty peremptory challenges to strike women from the jury pool.[7] In attempting to explain why his use of peremptory challenges was not racially motivated, the prosecutor said that he simply wanted "more men" on the jury.[8] The jury that was eventually seated convicted Eiland of second-degree murder and Tyler—the apparent triggerman—of first-degree murder.[9] Both defendants appealed their convictions, arguing that the State used its peremptory challenges unconstitutionally to exclude women from the jury solely on the basis of gender.[10] Tyler also argued that the State's use of peremptory challenges was racially discriminatory.[11]

The Court of Special Appeals upheld both convictions and declined to extend the *Batson* principle to gender.[12] The court also rejected Tyler's argument—based squarely on *Batson*—that the State's challenges were racially motivated.[13] Reversing the intermediate court's decision, the Court of Appeals held that Maryland constitutional law prohibits the State from discriminating on the basis of gender in the use of peremptory challenges.[14] The court remanded both

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5. Eiland v. State, 92 Md. App. 56, 64, 607 A.2d 42, 46 (1992), *rev'd sub nom.* Tyler v. State, 330 Md. 261, 623 A.2d 648 (1993).

6. *Id.* at 64-66, 607 A.2d at 46-47. James "Jay" Bias III was the younger brother of former University of Maryland basketball star Len Bias. *Id.* at 62, 607 A.2d at 45. Len Bias died of a cocaine overdose hours after being picked by the Boston Celtics in the National Basketball Association's annual draft in 1986. Jon Jeter, *Convictions in Jay Bias Homicide Reversed*, WASH. POST, Apr. 28, 1993, at A1. The two brothers died in the same emergency room. *Id.*

7. *Eiland*, 92 Md. App. at 86, 607 A.2d at 57. Eleven were black women. *Id.* at 94, 607 A.2d at 61. The Court of Special Appeals conceded that the State had exercised its challenges against women at a rate 50% greater than random selection would predict, establishing an obvious pattern of gender discrimination. *Id.* at 87, 607 A.2d at 58. The record did not disclose the makeup of the jury that was finally seated, but a newspaper account indicated it included eight women and four men. Enrique J. Gonzales, *Jurors Convict 2 in Bias Murder*, WASH. TIMES, May 1, 1991, at B1.

8. *See Tyler*, 330 Md. at 268, 623 A.2d at 652 ("As a general theory of the State's case, the State wanted more men on this case, and wanted older as opposed to younger . . . .").

9. *Eiland*, 92 Md. App. at 62, 607 A.2d at 45. Both men were also convicted of handgun charges. *Id.*, 607 A.2d at 45-46.

10. *Id.*, 607 A.2d at 46.

11. *Id.*

12. *Id.* at 90-91, 607 A.2d at 59.

13. *See id.* at 96-97, 607 A.2d at 62. "A variety of non-racial reasons were given for [the State's] strikes. The most frequently recurring reason was that the challenged jurors were female." *Id.* at 96, 607 A.2d at 62.

14. *Tyler*, 330 Md. at 270, 623 A.2d at 653.

cases, directing the trial court to vacate the judgments and to grant new trials.[15]

2. Legal Background.—At common law, women were excluded from jury service because of the "defect of sex"—*propter defectus sexus.*[16] Women gained the right to serve on juries in stages. First, in 1946, the Supreme Court held that women could not be excluded from federal juries sitting in states where women were eligible for jury service under local law.[17] States, however, still could exclude women from juries[18] and, in 1948, fifteen did.[19] Finally, in 1975, the Court held that the Sixth Amendment's fair-cross-section requirement[20] could not be satisfied if women were systematically excluded as jurors.[21] In *Tyler*, the Court of Appeals addressed the next issue in this progression: whether prosecutors may exercise peremptory challenges to exclude women systematically from service on a petit jury.[22]

a. The History and Expansion of Batson.—Peremptory challenges have long been a prominent part of the American judicial sys-

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15. *Tyler*, 330 Md. at 271, 623 A.2d at 653. At retrial, Jerry Tyler was convicted of first-degree murder on March 23, 1994. Jon Jeter, *Man Convicted Again in Bias Slaying*, WASH. POST, Mar. 24, 1994, at B3. There were six women and six men on his jury. Jim Keary, *Bias Killer Convicted; Second Jury Finds Tyler First-Degree Murderer*, WASH. TIMES, Mar. 24, 1994, at C10.

Gerald Eiland was acquitted on December 9, 1993. Eugene L. Meyer, *Driver Found Not Guilty in Bias Slaying; Retrial Verdict Blasted by Victim's Parents*, WASH. POST, Dec. 10, 1993, at C1. Eiland's jury was comprised of nine women and three men. Eugene L. Meyer, *Retrial Starts in Bias Slaying*, WASH. POST, Dec. 8, 1993, at D3.

16. 3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1321-22 (William D. Lewis ed., 1922). Juries made up entirely of women were empaneled only when the issue was whether or not a woman was pregnant. *Id.* at 1322.

17. Ballard v. United States, 329 U.S. 187, 191-92 (1946). The Court noted that men and women "are not fungible" and that a "distinct quality is lost if either sex is excluded" from jury service. *Id.* at 193, 194. "[I]f the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?" *Id.* at 193.

18. *See id.* at 190-91.

19. Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 61 n.6 (1986).

20. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury." U.S. CONST. amend. VI. This right has been interpreted as requiring a jury venire that represents a fair cross-section of the community. *See generally* Taylor v. Louisiana, 419 U.S. 522, 526-28 (1975) (reviewing fair-cross-section cases).

21. *Taylor*, 419 U.S. at 531. Before *Taylor*, a woman would not be selected for service in Louisiana unless she filed a written declaration of her desire to serve. *Id.* at 523. *Taylor* overruled Hoyt v. Florida, 368 U.S. 57 (1961), in which the Court upheld a jury selection system virtually identical to Louisiana's. *Taylor*, 419 U.S. at 533-37; *see also* Duren v. Missouri, 439 U.S. 357 (1979) (holding unconstitutional a statute granting women an automatic exemption from jury service if they requested it).

22. *Tyler*, 330 Md. at 263, 623 A.2d at 649.

tem.[23] Although they are not an enumerated constitutional right,[24] they are viewed as an excellent means of assuring the selection of a qualified and unbiased jury.[25] They "eliminate extremes of partiality on both sides, [and] assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[26]

The right of parties to exercise their peremptory challenges is not unlimited. In *Strauder v. West Virginia*,[27] the Supreme Court acknowledged for the first time that trying a black defendant before a jury from which blacks have been purposefully excluded denies the defendant his right to equal protection.[28] It, however, explicitly sanctioned the right of states to exclude women.[29]

The Court dealt specifically with the issue of discriminatory use of peremptory challenges in *Swain v. Alabama*.[30] There, an all-white jury convicted a black defendant of rape after the State struck all six black potential jurors.[31] In this situation, the Court held that a prosecutor violates the Equal Protection Clause only when "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," he removes blacks peremptorily "with the result that no [blacks] ever serve on petit juries."[32] Thus, *Swain* placed a harsh burden on defendants by requiring that they show not only that the prosecution excluded all potential jurors of a particular race at their trials, but also that it consistently had done the same in past trials.[33]

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23. *See generally* Swain v. Alabama, 380 U.S. 202, 212-19 (1965) (reviewing the historical credentials of the peremptory challenge system).

24. *Id.* at 219.

25. *See id.* (noting the "long and widely held belief that the peremptory challenge is a necessary part of trial by jury").

26. *Id.*

27. 100 U.S. 303 (1880).

28. *Id.* at 305, 309. The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

29. *See Strauder*, 100 U.S. at 310 ("[A state] may confine the selection [of jurors] to males . . . .").

30. 380 U.S. 202 (1965).

31. *Id.* at 210. The jury was also all-male because Alabama law at the time only allowed "*male* citizens . . . over 21 who are reputed to be honest . . . and are esteemed for their integrity" to be eligible for jury duty. *Id.* at 206 (emphasis added). Alabama was one of three states still excluding women in the early 1960s. Weisbrod, *supra* note 19, at 61 n.7.

32. *Swain*, 380 U.S. at 223.

33. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986) (noting that state courts have found the burden "most difficult" and sometimes "insurmountable"); Stanley v. State, 313 Md. 50, 56, 542 A.2d 1267, 1269 (1988) ("For more than twenty years, *Swain* essentially

The Court eased the burden on defendants in *Batson v. Kentucky*.[34] Under *Batson*, a prima facie case of purposeful discrimination can be established "*solely on evidence* concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*."[35] After the defendant establishes his prima facie case,[36] the burden shifts to the State to give a racially neutral explanation for the peremptory challenge.[37] The explanation need not "rise to the level justifying" challenges for cause,[38] but the State cannot effectively rebut by "stating merely that [it] challenged jurors of the defendant's race on the assumption—or [its] intuitive judgment—that they would be partial to the defendant because of their shared race."[39] Similarly, a simple denial of discriminatory motive or affirmation of good faith by the prosecutor does not constitute effective rebuttal.[40] Recognizing that the use of discriminatory peremptory challenges harms defendants and excluded venirepersons, undermines public confidence in the judicial system, and stimulates community prejudices,[41] the Court announced that a juror's fitness depends on "an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."[42]

Since *Batson*, the Supreme Court has steadily extended the scope of its holding. It has held that states cannot exclude black jurors on the basis of race in the trial of a white defendant;[43] that states cannot peremptorily challenge potential jurors on the basis of ethnicity;[44] that private litigants in a civil action cannot exercise peremptory chal-

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foreclosed . . . the establishment of a violation of the equal protection clause given an apparently racially motivated exercise of a prosecutor's peremptory challenges.").

34. 476 U.S. 79 (1986).

35. *Id.* at 96 (emphasis added).

36. To do so, the defendant must show that he belongs to a "cognizable racial group" and that the prosecutor has removed members of defendant's race from the venire peremptorily. *Id.* Powers v. Ohio, 499 U.S. 400 (1991), effectively eliminated this requirement. *See infra* note 43 and accompanying text.

37. *Batson*, 476 U.S. at 79, 97.

38. *Id.*

39. *Id.*

40. *Id.* at 98. This part of the holding undermines *Swain*'s "presumption in any particular case . . . that the prosecutor is using the State's challenges to obtain a fair and impartial jury." Swain v. Alabama, 380 U.S. 202, 222 (1965).

41. *Batson*, 476 U.S. at 87-88.

42. *Id.* at 87.

43. Powers v. Ohio, 499 U.S. 400 (1991) (holding that a white defendant could object to the State's use of seven peremptory challenges against blacks).

44. Hernandez v. New York, 111 S. Ct. 1859 (1991) (plurality opinion) (holding that the prosecutor offered race-neutral reasons for striking two Hispanic venirepersons when he stated he doubted their ability to defer to the official translation of Spanish testimony).

lenges in a racially discriminatory manner;[45] and that criminal defendants cannot exercise peremptory challenges based solely on race.[46]

b. Batson *in Maryland.*—The Court of Appeals examined the impact of *Batson* on Maryland procedure in *Stanley v. State.*[47] In Maryland, a defendant must show by a preponderance of the evidence that the State used peremptory challenges discriminatorily.[48] In order to effectively rebut the defendant's claim, the State must articulate a reason that is not only racially neutral, but "related to the case to be tried, clear and reasonably specific, and legitimate."[49] In addition, the *Stanley* court held that "*[a]ny* violation requires a new trial;" "the State will not be allowed 'one free discriminatory strike.'"[50]

Applying these principles, the Court of Appeals reversed a conviction in *Tolbert v. State*[51] because the State had not articulated racially neutral reasons for challenging four black women.[52] It declined, however, to reach the question of whether *Batson* extends to gender-based peremptory challenges.[53]

c. Conflict Among the Courts.—Many state courts and several federal Courts of Appeals have examined the issue of gender-based peremptory challenges. The decisions and their rationales have not been uniform.

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45. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that because the use of peremptory challenges in a civil suit is a form of state action, civil parties cannot use them discriminatorily).

46. Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that a criminal defendant's use of peremptory challenges constitutes state action and thus cannot be exercised on the basis of race).

47. 313 Md. 50, 542 A.2d 1267 (1988).

48. *Id.* at 71, 542 A.2d 1277. Defendants Stanley and Trice both established prima facie cases of racially based use of peremptory challenges. In Stanley's case, the State used 80% of its peremptories to exclude blacks, who made up less than 25% of the venire, although they constituted roughly 50% of the forum county's population. *Id.* at 65, 72, 542 A.2d at 1274, 1278. The court emphasized that only two of the excluded blacks spoke during voir dire and that their answers did not make either a "clear choice" for challenge. *Id.* at 73, 542 A.2d at 1278. In Trice's case, the State struck the only black venire person. *Id.* at 81-82, 542 A.2d at 1281. The court held that "total elimination establishes a prima facie case requiring explanations from the prosecution." *Id.* at 85, 542 A.2d at 1284.

49. *Id.* at 78, 542 A.2d at 1280.

50. *Id.* at 93, 542 A.2d at 1288.

51. 315 Md. 13, 553 A.2d 228 (1989).

52. *Id.* at 23, 553 A.2d at 232. The prosecutor indicated he was trying to strike "young women," yet one of the black women he struck was 38 and the other was 54. *Id.* at 23, 553 A.2d at 232. Two women in their twenties were seated, the alternate juror was a 24-year-old female, and the prosecutor struck only the youngest female on the panel, a 23-year-old. *Id.* at 22, 553 A.2d at 232.

53. *Id.* at 23 n.7, 553 A.2d at 232 n.7.

In *United States v. Hamilton*,[54] the Court of Appeals for the Fourth Circuit rejected the argument that gender discrimination in the use of peremptory challenges violates the Sixth and Fourteenth Amendments.[55] It held that gender, not race, motivated the State's challenges in the case[56] and declined to extend *Batson* to women.[57] The Seventh Circuit has also limited *Batson* to race.[58] In *United States v. Nichols*, it held that the government's explanation for striking three black women was racially neutral and that the court did not have to consider gender.[59] The Fifth Circuit also has ruled that *Batson* does not extend to women.[60] It declared in 1993 that "striking women . . . for the sole reason of their sex is nigh pointless because it cannot succeed except in isolated cases" in eliminating women from juries.[61]

The Ninth Circuit, on the other hand, has extended *Batson* to gender. In *United States v. De Gross*,[62] the court held that in order for gender discrimination to be constitutionally permissible, it must be "substantially related to the achievement of important governmental objectives."[63] The use of peremptory strikes constitutes an important

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54. 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990).

55. *Id. Hamilton* illustrates the disproportionate effect of peremptory strikes on black women. Black women are at the greatest risk of exclusion from jury service because gender is a tolerated pretext for racial discrimination. The government used seven of its eight peremptory challenges to strike blacks in the case. *Id.* at 1041. Six of those struck were black women. *Id.* at 1043 (Murnaghan, J., dissenting).

In his dissent, Judge Murnaghan dismissed the argument that the State struck the women because of their age, finding it "completely wanting in rationality or validity because *only* black women were struck while *no* white women were." *Id.* (citations omitted). For a discussion of the disproportionate striking of black women in *Tyler*, see *supra* note 7.

56. *Hamilton*, 850 F.2d at 1041.

57. *See id.* at 1042 ("[T]here is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges.").

58. United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992).

59. *Id.* at 1262.

60. United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993) (holding that the trial court's refusal to dismiss two female jurors peremptorily challenged by the defendant was reversible error).

61. *Id.*

62. 960 F.2d 1433 (9th Cir. 1992) (en banc).

63. *Id.* at 1439. The Supreme Court first articulated the heightened scrutiny test for quasi-suspect classifications such as gender in Craig v. Boren, 429 U.S. 190 (1976). In *Craig*, the Court held unconstitutional a statute that prohibited the sale of 3.2% alcohol beer to males under the age of 21 and females under the age of 18. The Court stated that in order to withstand constitutional challenge, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. The Court modified the test slightly in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), in which it held that the policy of a state-supported university limiting enrollment to women violated the Equal Protection Clause. In *Hogan*,

governmental objective because it is necessary to assure the impaneling of a fair and impartial jury.[64] According to the court, striking potential jurors for gender alone can be based only on "the false assumption that members of certain groups are unable to consider impartially the case against a member or a nonmember of their group."[65] Thus, the court concluded that such a strike does not aid in achieving an impartial jury and is not rationally related to that end.[66]

Several state courts have employed state constitutional provisions regarding gender discrimination to expand *Batson*'s scope. Five states have relied either partially or wholly on their state constitutions to extend *Batson* protections to gender-based peremptory challenges.[67] Other state courts have held that the Equal Protection Clause of the federal Constitution prohibits such challenges.[68]

Five states have declined to extend *Batson* to gender-based peremptory challenges. Two of those states held that they would not extend *Batson* to gender until the highest state court or the United States Supreme Court ruled on the issue.[69] The others limited *Batson* to its facts and held it applicable only to claims alleging race discrimination.[70] Three other states have considered the issue but have left it undecided.[71]

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the Court held that proponents of gender classifications must meet the burden of "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 724 (citations omitted).

The test for racial classifications is stricter. In order to survive a challenge based on the Equal Protection Clause, a racial classification "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of [its] legitimate purpose." Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (citations omitted) (holding that child custody decisions cannot take into consideration the effects of racial prejudice).

64. *De Gross*, 960 F.2d at 1439.

65. *Id.*

66. *Id.*

67. *See* Di Donato v. Santini, 283 Cal. Rptr. 751 (Ct. App. 1991); State v. Levinson, 795 P.2d 845 (Haw. 1990); Commonwealth v. Hyatt, 568 N.E.2d 1148 (Mass. 1991); State v. Gonzales, 808 P.2d 40 (N.M. Ct. App.), *cert. denied*, 806 P.2d 65 (N.M. 1991); State v. Burch, 830 P.2d 357 (Wash. Ct. App. 1992).

68. *See, e.g.*, People v. Irizarry, 560 N.Y.S.2d 279 (App. Div. 1990); City of Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993).

69. *See* Daniels v. State, 581 So. 2d 536 (Ala. Crim. App. 1990), *cert. denied*, 112 S. Ct. 315 (1991); Hannan v. Commonwealth, 774 S.W.2d 462 (Ky. Ct. App. 1989).

70. State v. Morgan, 553 So. 2d 1012 (La. Ct. App. 1989), *cert. denied*, 558 So. 2d 600 (La. 1990); State v. Culver, 444 N.W.2d 662 (Neb. 1989); State v. Oliviera, 534 A.2d 867 (R.I. 1987).

71. People v. Mitchell, 593 N.E.2d 882 (Ill. App. Ct. 1992), *vacated in part, aff'd in part*, 614 N.E.2d 1213 (Ill. 1993); State v. Pullen, 843 S.W.2d 360 (Mo. 1992) (en banc), *cert. denied*, 114 S. Ct. 200 (1993); State v. Harrison, 805 P.2d 769 (Utah Ct. App.), *cert. denied*, 817 P.2d 327 (Utah 1991).

3. The Court's Reasoning.—In *Tyler*, the Court of Appeals ruled that Maryland constitutional law prohibits the State from using peremptory challenges to exclude potential jurors solely on the basis of gender.[72] In so holding, it first examined the *Batson* Court's application of strict scrutiny in judging allegations of illegal racial discrimination in jury selection.[73] Noting that the Supreme Court had not yet extended the *Batson* rationale to gender discrimination, the court turned to a consideration of state law.[74]

Although the Maryland Constitution contains no express equal protection clause, the court has interpreted Article 24 of the Declaration of Rights[75] as applying "'in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution.'"[76] Consequently, Supreme Court decisions regarding the Fourteenth Amendment provide virtually direct authority to the Maryland courts in interpreting the equal protection component of Article 24.[77] In addition, the court pointed to Maryland's Equal Rights Amendment (ERA),[78] which mandates "'equality of rights under the law and render[s] state-sanctioned sex-based classifications suspect.'"[79] The court held that state action encouraging gender-based classifications without substantial justification violates the ERA just as similar race-based classifications violate the Fourteenth Amendment.[80] In other words, in Maryland, "'gender-based classifications are suspect and are subject to strict scrutiny.'"[81] Article 24, in combination with the ERA, extends the *Batson* holding to include gender.[82] Thus, the court held

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72. *Tyler*, 330 Md. at 266, 623 A.2d at 651.

73. *Id.* at 263-64, 623 A.2d at 649-50.

74. *Id.* at 264, 623 A.2d at 650.

75. Article 24 of the Declaration of Rights states: "[N]o man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST. DECL. OF RTS. art. 24.

76. *Tyler*, 330 Md. at 264, 623 A.2d at 650 (quoting Attorney Gen. v. Waldron, 289 Md. 683, 704, 426 A.2d 929, 941 (1981)).

77. *Id.* at 265, 623 A.2d at 650.

78. The Equal Rights Amendment appears in Article 46 of the Declaration of Rights and provides: "Equality of rights under the law shall not be abridged or denied because of sex." MD. CONST. DECL. OF RTS. art. 46.

79. *Tyler*, 330 Md. at 265, 623 A.2d at 650 (quoting State v. Burning Tree Club, Inc., 315 Md. 254, 269, 554 A.2d 366, 374, *cert. denied*, 493 U.S. 816 (1989)).

80. *Id.*

81. *Id.* at 266, 623 A.2d at 651 (quoting Briscoe v. Prince George's County Health Dep't, 323 Md. 439, 452 n.7, 593 A.2d 1109, 1115 n.7 (1991)). Maryland scrutinizes gender-based discrimination more closely than the Supreme Court. *See supra* note 63 (describing the analysis the Supreme Court uses on race-based and gender-based classifications).

82. *Tyler*, 330 Md. at 270, 623 A.2d at 653.

that the State may not exercise peremptory challenges at trial in a way that discriminates against women.[83]

The court did not remand the case to permit the State to rebut the defendants' prima facie case of gender discrimination.[84] Instead, it found that since the State already had admitted using its peremptories to secure more male jurors, it essentially had admitted to striking women "simply because of their sex."[85] Thus, it had forfeited the opportunity to explain its use of the peremptory challenges on a gender-neutral basis.[86]

In a brief dissent, Judges McAuliffe, Rodowsky and Karwacki argued that the Court of Special Appeals properly decided the case.[87] The intermediate court attempted to reconcile the broad sweep of the Equal Protection Clause with the Supreme Court's "repeated protestations" that peremptory challenges retained their peremptory nature, even after the expansion of the *Batson* line of cases.[88] The lower court was not "persuaded that the glare of equal protection should properly focus upon the use of peremptory challenges in the context of a single case."[89] It took a conservative view of *Batson* and held that the *Swain* standard of systematic bias shown over the course of many cases was the appropriate standard for reviewing gender bias in jury selection.[90]

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83. *Id.* at 263, 623 A.2d at 649. The Court of Appeals could have based its opinion solely on state statutory law. Section 8-103 of the Courts and Judicial Proceedings Article provides that a "citizen may not be excluded from service as a grand or petit juror . . . on account of race, color, religion, *sex*, national origin, or economic status." MD. CODE ANN., CTS. & JUD. PROC. § 8-103 (1989) (emphasis added). The court might also have ruled on § 8-210(d), which states that "[n]o person or *class* of person may be disqualified, excused, or exempted from service as a juror except under this section or § 8-209." MD. CODE ANN., CTS. & JUD. PROC. § 8-210 (1989) (exempting military personnel and persons 70 years old or older who have requested an exemption from service). Maryland courts have used this statute's unambiguous language to prohibit disqualifications based on the potential juror's beliefs or group membership. *See* King v. State, 287 Md. 530, 414 A.2d 909 (1980) (holding that a juror's belief that a marijuana law should be changed did not disqualify him from jury service); Hopkins v. State, 24 Md. App. 53, 329 A.2d 738 (1974) (holding that a potential juror's status as a police officer did not demonstrate bias that required disqualification). The plain meaning of the statute similarly could be read to prohibit the exclusion of any cognizable group, such as women, from petit juries.

84. *Tyler*, 330 Md. at 271, 623 A.2d at 653. The court has remanded to allow prosecutors to explain their use of peremptory challenges against black venirepersons. *See* State v. Gorman, 324 Md. 124, 596 A.2d 629 (1991) (holding that the State never had the chance to rebut the defendant's prima facie case of racial discrimination in jury selection).

85. *Tyler*, 330 Md. at 268, 623 A.2d at 652.

86. *Id.* at 271, 623 A.2d at 653.

87. *Id.* at 272, 623 A.2d at 654 (McAuliffe, J., dissenting).

88. Eiland v. State, 92 Md. App. 56, 88, 607 A.2d 42, 58 (1992), *rev'd sub nom.* Tyler v. State, 330 Md. 261, 623 A.2d 648 (1993).

89. *Id.* at 91, 607 A.2d at 59-60.

90. *Id.*, 607 A.2d at 60.

It insisted that *Batson* had never been a part of Maryland state law and found no "*Maryland* law that [the facts of the case] could violate."[91]

4. Analysis.—In *Batson*, the Court did not indicate whether its holding applied to groups other than blacks.[92] Its focus, rather, was on eliminating invidious discrimination against blacks and their historical exclusion from jury service.[93] Nothing in *Batson*, however, restricts its ruling to suspect classes or groups that receive strict scrutiny analysis. Consequently, its protections arguably extend to other groups that have suffered invidious discrimination. In *Tyler*, the Court of Appeals decided that the ERA's mandate that gender classifications be strictly scrutinized placed gender within the orbit of *Batson*.[94] Because, like blacks, women historically have been the victims of invidious discrimination,[95] the court's decision is defensible.

Even if *Batson*'s reach is restricted to suspect classifications, Maryland's ERA case law would require that in Maryland, at least, gender fall under the rationale of *Batson*.[96] Prior to *Tyler*, the Court of Ap-

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91. *Id.* at 94, 607 A.2d at 61.

92. Courts declining to extend *Batson* to gender have given great weight to this fact. *See, e.g.*, United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988) ("[I]f the Supreme Court . . . had desired, it could have . . . prohibited the exercise of the challenges on the basis of race, gender, age or other group classification."), *cert. denied*, 493 U.S. 1069 (1990); Hannan v. Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989) (stressing that *Batson* "discusses the equal protection safeguards only in terms of racial discrimination"). *But see* United States v. De Gross, 960 F.2d 1433, 1438 n.6 (9th Cir. 1992) (en banc) ("We believe that there is no more significance to that language than the fact that the case involved peremptory strikes against black venirepersons. *Batson*'s rationale applies equally well to gender-based peremptory strikes.").

The *Batson* Court's statement that "the State's privilege to strike individual jurors through peremptory challenges . . . is subject to the commands of the Equal Protection Clause," Batson v. Kentucky, 476 U.S. 79, 89 (1986), indicates that the *Batson* holding is not limited to race alone and should logically extend to any class covered by the Equal Protection Clause.

93. *Batson*, 476 U.S. at 86-87.

94. *Tyler*, 330 Md. at 266, 623 A.2d at 653.

95. The Supreme Court has discussed at length the history of sexual discrimination:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . . As a result of notions [that a woman's role was as wife and mother], our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names . . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right . . . until adoption of the Nineteenth Amendment half a century later.

Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (citations omitted).

96. *See supra* notes 78-82 and accompanying text.

peals declared that any state-backed distinction between men and women must be "narrowly tailored and precisely limited" in order to achieve a compelling government interest.[97] The use of impartial juries is one such interest, but challenges explainable only on the basis of gender are not substantially related to achieving that end. They are based solely on the impermissible assumption that women are partial.[98] In *Tyler*, the defense established by a preponderance of the evidence that the State had used peremptory challenges to exclude women from the jury solely because of their gender.[99]

The State, on the other hand, argued that gender-based peremptory challenges are acceptable because women are not, as a rule, tried in front of all-male juries.[100] This argument ignores the principle that even one discriminatory strike is erroneous and implies that gender discrimination is not objectionable unless women are entirely eliminated from juries. On the contrary, any discriminatory use of peremptories "contaminate[s] . . . public confidence in a judicial process that condones systematic, blatant gender discrimination in the selection of juries."[101]

The Court of Special Appeals indicated that the use of peremptory challenges more likely reflects trial strategy than systematic oppression.[102] The Court of Appeals, however, dismissed any notion that the State could proffer a gender-neutral reason for peremptorily striking women after admitting an intention to get more men on the jury. In fact, the court castigated the prosecutor for his trial tactics: "From his own mouth, it is patent that his attempts to exclude women were simply that he believed that he had a better chance to obtain

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97. State v. Burning Tree Club, Inc., 315 Md. 254, 296, 554 A.2d 366, 387, *cert. denied*, 493 U.S. 816 (1989).

98. *See Batson*, 476 U.S. at 86, 89 (stating that the Equal Protection Clause guarantees that potential jurors will not be excluded based on a false assumption that they are unqualified or partial); *see also Frontiero*, 411 U.S. at 686 ("[W]hat differentiates sex from . . . nonsuspect statuses . . . and aligns it with the recognized suspect criteria, is that [gender] frequently bears no relation to ability to perform or contribute to society.").

99. *See supra* text accompanying notes 85-86.

100. Brief of Respondent at 14.

101. City of Mandan v. Fern, 501 N.W.2d 739, 748 (N.D. 1993). The court also asserted that ignoring the rationale of *Batson* in claims of gender discrimination in peremptory challenges "would make that conduct not only systematic, but also systemic." *Id.*

102. Eiland v. State, 92 Md. App. 56, 91-92, 607 A.2d 42, 60 (1992) (stating that "today's target group may be tomorrow's favored group with random interchangeability"), *rev'd sub nom.* Tyler v. State, 330 Md. 261, 623 A.2d 648 (1993). Similarly, the Supreme Court has repeatedly reasoned that "if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." Georgia v. McCollum, 112 S. Ct. 2348, 2354 (1992).

guilty verdicts from a jury composed of men (preferably older men) than one composed of women (particularly young women)."[103]

Thus, it is possible that, as a result of *Tyler*, every strike of a female venireperson will be claimed to be suspect. Parties might also argue that the court prohibited the use of peremptory challenges to exclude men and women.[104] As the number of *Batson* inquiries increases, the nature and purpose of peremptory challenges may be constructively eliminated. The attack on the peremptory challenge in Maryland already has been particularly potent; state law has prohibited its use to exclude not only blacks and women, but also Hispanics[105] and whites.[106]

Even the United States Supreme Court has not escaped the issue; it will decide this Term whether the Equal Protection Clause covers gender-based challenges. It recently heard arguments on the issue in *J.E.B. v. T.B.*[107] Although the Court might hold that *Batson* extends to gender, four Supreme Court Justices have expressed concern about the extension of *Batson* and the consequent erosion of peremptory challenges.[108]

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103. *Tyler*, 330 Md. at 271, 623 A.2d at 653.

104. Although the *Tyler* court only discussed women, the ERA has been used to strike down laws discriminating against men. *See, e.g.*, Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (holding that a father is no longer primarily responsible for the support of his minor children); Coleman v. State, 37 Md. App. 322, 377 A.2d 553 (1977) (holding a statute making it a crime for a man to desert his wife unconstitutional).

105. Mejia v. State, 328 Md. 522, 616 A.2d 356 (1992) (holding that the removal of the only Hispanic in the jury venire established a prima facie case of discrimination).

106. Gilchrist v. State, 97 Md. App. 55, 627 A.2d 44 (1993) (holding that the Equal Protection Clause prevents defendants from exercising peremptory challenges to exclude white venirepersons).

107. 606 So. 2d 156, 156-57 (Ala. Civ. App. 1992), *cert. granted*, 113 S. Ct. 2330 (1993). The Alabama Court of Civil Appeals ruled against the petitioner, who asserted that the State improperly used its peremptory strikes to exclude men from the jury in a paternity suit. *Id.* The State managed to seat 12 women after using 9 of its 10 peremptory strikes against men. *Court Considers Prohibiting Jury Selection Based on Sex*, WASH. TIMES, Nov. 1, 1993, at A4. Petitioner struck 10 women and the last man in the venire. *Id.* The jurors found that J.E.B. was the father of T.B.'s child, and the court ordered him to pay child support. *Id.*

108. In 1991, Justices O'Connor, Rehnquist, and Scalia dissented in Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), which extended peremptory challenges to civil litigants. Scalia wrote a separate dissent indicating he would hold that sex is an appropriate basis for the use of a peremptory challenge. *Id.* at 2095-96 (Scalia, J., dissenting). Justice O'Connor has written elsewhere that a peremptory strike would violate *Batson* "only if the prosecutor struck a juror *because of the juror's race.*" Hernandez v. New York, 111 S. Ct. 1859, 1874 (1991) (O'Connor, J., concurring); *see also* Brown v. North Carolina, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring in denial of *certiorari*) ("Outside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies."). Justice Thomas's concurrence in Georgia v. McCollum, 112 S. Ct. 2348 (1992), also advised against using the Constitution to limit the discretionary use of

5. Conclusion.—The Court of Appeals has made clear in *Tyler* that selecting jurors in a fair and nondiscriminatory manner is a compelling state interest, far more compelling than winning a case with suspect or questionable trial tactics. Like several other states and at least one federal circuit court, the court extended *Batson* to gender. Because the *Tyler* decision was based on well-settled Maryland law, its prohibition against gender-based peremptory challenges should withstand attack, regardless of how the Supreme Court rules on the issue.[109]

JESSICA COLLINS

C. *Discrimination in the Exercise of Peremptory Challenges: Proving Ethnic Identity of Excluded Jurors*

In *Mejia v. State*,[1] the Court of Appeals held that a criminal defendant successfully presented, under the authority of *Batson v. Kentucky*,[2] a prima facie challenge against the prosecutor's use of a peremptory strike to exclude the only Hispanic venireperson from the jury in his trial.[3] The court held that the defendant, alleging a discriminatory motive behind the strike, did not need to present substantive evidence that the excluded venireperson was the only member of a cognizable group because the record reflected an agreement between the parties as to this fact.[4] The court also held that the prosecu-

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peremptory challenges. Thomas warned, "Next will come the question of whether defendants may exercise peremptories on the basis of sex." *Id.* at 2361 (Thomas, J., concurring).

109. The Supreme Court decided *J.E.B. v. Alabama* ex rel. *T.B.* on April 19, 1994, after the writing of this case note. In a 6-3 decision, which cited *Tyler*, the Court extended *Batson* to gender. J.E.B. v. Alabama *ex rel.* T.B., 1994 WL 132232 (U.S.), *2 & n.1. The Court held, in an opinion by Justice Blackmun, that gender-based peremptory challenges violate the Equal Protection Clause "particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.* at *2. The Court also stressed that the decision does not "imply the elimination of all peremptory challenges." *Id.* at *7.

Five justices joined the opinion of the Court, including Justice O'Connor, who also filed a concurring opinion. Justice Kennedy concurred in the judgment, writing a separate opinion.

Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented in two opinions. Chief Justice Rehnquist wrote that the biological and experimental differences between men and women make gender-based peremptory challenges "not the sort of derogatory and invidious act" that race-based peremptories are. *Id.* at *14. Justice Scalia wrote that there was no denial of equal protection nor was there any injury to the defendant. *Id.* at *15.

1. 328 Md. 522, 616 A.2d 356 (1992).
2. 476 U.S. 79 (1986).
3. *See Mejia*, 328 Md. at 539, 616 A.2d at 364.
4. *Id.*

tor's effective elimination of an entire ethnic group from the jury[5] was enough to constitute the defendant's prima facie case and shift the burden to the State to offer a neutral, nondiscriminatory explanation for its strike.[6] In so holding, the court eased the burden on defendants in raising *Batson* objections and limited the required litigation over such objections to matters in dispute.

1. The Case.—On January 7, 1991, jury voir dire began in the Circuit Court for Montgomery County in the trial of Ivan Antonio Mejia, a man of Hispanic background charged with rape and related sexual offenses.[7] Early in the voir dire proceedings, when the defendant's counsel noted his failure to submit a question regarding whether any venirepersons spoke Spanish,[8] the trial judge agreed to ask whether the venirepersons would be prejudiced by the defendant's need for an interpreter.[9] Later in the proceedings, when a venireperson named Peter Estrada answered a question regarding legal training,[10] the defendant's counsel noted for the record that Estrada appeared to be the only Hispanic venireperson.[11] Still later, the judge again asked the venirepersons whether they were prejudiced by the defendant's need for an interpreter and also whether they spoke Spanish.[12] Estrada responded that he spoke Spanish.[13]

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5. *Id.*

6. *Id.* at 539-41, 616 A.2d at 364-65.

7. *Id.* at 525-26, 616 A.2d at 357.

8. *Id.* at 526, 616 A.2d at 357.

9. *Id.*, 616 A.2d at 357-58.

10. *Id.*, 616 A.2d at 358.

11. *Id.* The dialogue was as follows:

> [Defendant's Counsel]: As far as I can tell, I noticed that that is the only juror with a[n] Hispanic background. I wanted to note that for the record in terms of jury strikes later that Mr. Estrada, as far as I can tell, is the only juror with an Hispanic background.
>
> THE COURT: You noticed that?
>
> [Defendant's Counsel]: I don't know what will come of it, but I just wanted to mention it.

Id.

12. *Id.* at 527, 616 A.2d at 358. The judge referred to the situation as the "Hispanic problem." *Id.*

13. *Id.* The record reads: "THE COURT: Does anyone here speak and understand Spanish? Mr. Estrada?" *Id.* The Court of Special Appeals misinterpreted the record. It operated under the assumption that because no prospective juror affirmatively stated that he or she spoke or understood Spanish, that none in fact did. Mejia v. State, 90 Md. App. 31, 45, 599 A.2d 1207, 1214 (1992), *rev'd*, 328 Md. 522, 616 A.2d 356 (1992). On appeal before the Court of Appeals, the State did not object to the defendant's proffer that Estrada stood in response to the trial judge's question and that the judge acknowledged his affirmative response by calling his name. *Mejia*, 328 Md. at 527 n.2, 616 A.2d at 358 n.2.

During the empaneling of the jury, the State peremptorily struck Estrada.[14] The defendant's counsel immediately requested a bench conference and objected to the strike as discriminatory[15] under *Batson v. Kentucky*,[16] noting that Estrada appeared to be the only Hispanic venireperson in the fifty-person panel.[17] The judge overruled the objection without any further inquiry and without asking for a response from the State.[18] The trial proceeded, and the defendant was convicted of attempted rape in the second degree and a second degree sexual offense.[19]

On appeal to the Court of Special Appeals, the defendant again argued that the State's peremptory strike was based on the venireperson's ethnicity.[20] Ruling that the defendant had not established a prima facie case of purposeful discrimination under *Batson*, the court affirmed the conviction.[21] The Court of Appeals granted certiorari to consider what proof a criminal defendant must produce to make a *Batson* objection alleging unlawful discrimination.[22]

2. *Legal Background.*—For more than a century, the Supreme Court has dedicated itself to the elimination of racial discrimination in jury selection. The first such case was *Strauder v. West Virginia*[23] in 1879, in which the Court struck down, under the Equal Protection Clause of the recently enacted Fourteenth Amendment,[24] a West Virginia statute allowing only white males to serve as jurors.[25] The Court held that denying otherwise qualified black individuals the right to "participate in the administration of the law"[26] constituted "a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to

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14. *Mejia*, 328 Md. at 527, 616 A.2d at 358.

15. *Id.* at 528, 616 A.2d at 358-59.

16. 476 U.S. 79 (1986).

17. *Mejia*, 328 Md. at 528, 616 A.2d at 359. The defendant's counsel also noted that the defendant was Hispanic and his alleged rape victim was white. *Id.*, 616 A.2d at 358-59.

18. *Id.*, 616 A.2d at 359.

19. *Id.* at 525, 616 A.2d at 357.

20. *See* Mejia v. State, 90 Md. App. 31, 34, 599 A.2d 1207, 1209, *rev'd*, 328 Md. 522, 616 A.2d 356 (1992).

21. *Id.* at 40, 599 A.2d at 1211.

22. *Mejia*, 328 Md. at 525, 616 A.2d at 357.

23. 100 U.S. 303 (1879). The case concerned the murder conviction of a black man who was indicted by an all-white grand jury and convicted by an all-white jury. *Id.* at 304-05.

24. U.S. CONST. amend. XIV, § 1. The amendment, which was enacted in 1868, reads in relevant part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

25. *Strauder*, 100 U.S. at 310.

26. *Id.* at 308.

individuals of the race that equal justice which the law aims to secure to all others."[27]

In 1965, the Supreme Court addressed for the first time a racial discrimination challenge to a prosecutor's use of peremptory strikes in *Swain v. Alabama*.[28] The *Swain* Court recognized that purposeful discrimination against blacks in jury selection violated the Equal Protection Clause,[29] but held that a criminal defendant could not object to a prosecutor's peremptory strikes with evidence from his trial alone.[30] Rather, the Court determined that a defendant must show a pattern of discriminatory peremptory strikes over a number of cases,[31] an extremely tough burden for criminal defendants to bear.[32]

This "crippling burden of proof"[33] imposed on criminal defendants was substantially reduced by the Court's 1986 holding in *Batson v. Kentucky*.[34] Reaffirming that a prosecutor's exercise of peremptory strikes is subject to the commands of the Equal Protection Clause,[35] the *Batson* Court held that a defendant could raise a prima facie challenge against a prosecution's discriminatory use of peremptory strikes with evidence of strikes solely from the defendant's trial.[36] The *Batson* Court held that in order to establish such a prima facie showing, the defense must first show that the defendant is a member of a cogniza-

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27. *Id.* Under authority of the Slaughter-House Cases, 83 U.S. 36 (1872), the Court stated that the purpose of the Fourteenth Amendment was to secure the rights of the recently emancipated black race. *Strauder*, 100 U.S. at 306-07. Thus, the *Strauder* Court's holding was limited to the protection of blacks. *Id.* at 310 ("Any State action that denies [legal protection of life, liberty, or property] to a colored man is in conflict with the Constitution."). In fact, the Court expressly stated that a state was still free to confine jury selection to "males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." *Id.*

28. 380 U.S. 202 (1965).

29. *Id.* at 203-04.

30. *Id.* at 221 ("[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws.").

31. *Id.* at 227 ("[T]he defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time."). The Court reasoned that in light of the valued and historic purpose of peremptory strikes, the prosecution was entitled to a presumption that it used its strikes to obtain a fair and impartial jury. *Id.* at 222. This presumption could not be overcome from evidence of strikes in any single case. *Id.*

32. In *Swain*, even a showing that no black person had served on a petit jury in the county for approximately 15 years was insufficient to prove the prosecution's pattern of discriminatory peremptory strikes because the defendant did not prove with particularity the precise circumstances of how prosecutors were responsible for striking black venirepersons from the jury panels. *Id.* at 226.

33. Batson v. Kentucky, 476 U.S. 79, 92 (1986).

34. 476 U.S. 79 (1986).

35. *Id.* at 89.

36. *Id.* at 96.

ble racial group and that the prosecutor used peremptory strikes to remove members of the defendant's race from the venire.[37] The defendant must then show that the facts and circumstances give rise to an inference that the prosecution used its strikes to exclude individual venirepersons solely on account of their race.[38] At this point, the trial judge makes a determination as to whether the defendant has made the requisite prima facie showing.[39] If so, the burden shifts to the prosecution to present a race-neutral explanation for striking the venirepersons in question.[40] The trial judge then determines whether the defendant successfully established purposeful discrimination by the prosecution.[41]

Since the 1986 holding, the *Batson* doctrine has been subject to significant expansion. Although *Swain* and *Batson* involved challenges by black defendants, courts have applied the doctrine to a broad array of racial and ethnic groups.[42] Courts are split on whether *Batson* should apply to gender-based classifications.[43] The Supreme Court added to the doctrine's expansion in the 1990s. In *Powers v. Ohio*,[44] the Court held that an individual presenting a *Batson* objection need not show that he and the excluded jurors are of the same race.[45] Fur-

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37. *Id.*

38. *Id.* The Court also stated that "the defendant is entitled to rely on the fact, as to which there can be little dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

39. *Id.* at 96-97.

40. *Id.* at 97. The Court noted that the prosecutor may not rebut the defendant's claim by merely stating that the venirepersons were challenged based on the assumption that jurors would be partial to members of their own race. *Id.* Nor may the rebuttal merely consist of a general denial of a discriminatory motive or a general affirmance of the prosecutor's good faith in selecting jurors. *Id.* at 98. Rather, the prosecutor must "articulate a neutral explanation related to the particular case to be tried." *Id.*

41. *Id.* at 98.

42. *See, e.g.*, Hernandez v. New York, 500 U.S. 352 (1991) (assuming, but not holding, that *Batson* applied to Hispanics); Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989) (whites); United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988) (Italian Americans); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987) (Native Americans); Commonwealth v. Gagnon, 449 N.E.2d 686 (Mass. App. Ct. 1983) (French Canadians).

43. Since the *Mejia* holding, the Court of Appeals extended the *Batson* holding to women in Tyler v. State, 330 Md. 261, 623 A.2d 648 (1993). For an in-depth discussion of *Tyler* and the split among state and federal courts on the extension of *Batson* to encompass gender-based classifications, see Jessica Collins, Note, *Prohibition of Gender-Based Peremptory Challenges, Developments in Maryland Law, 1992-93*, 53 MD. L. REV. 683 (1994).

44. 499 U.S. 400 (1991).

45. *Id.* at 415. The defendant, a white man charged with aggravated murder and other offenses, objected to the prosecution's use of peremptory strikes to exclude seven black venirepersons. *Id.* at 403. In upholding the defendant's claim, the Court held that the Equal Protection Clause prohibits a prosecutor from peremptorily striking any otherwise qualified venireperson solely on account of race. *Id.* at 409. A defendant raising a *Batson*

thermore, although *Batson* was limited to alleged discrimination by criminal prosecutors, subsequent cases have extended the prohibition against discriminatory use of peremptory strikes to litigants in civil suits[46] and to criminal defendants.[47] Thus, no parties in either civil or criminal trials may discriminate on the basis of race in the use of peremptory strikes, and any party may raise a *Batson*-type objection.

3. The Court's Reasoning.—In holding that Mejia successfully presented a prima facie showing of purposeful discrimination, the Court of Appeals addressed the question of the proof required to establish that a defendant and excluded venirepersons are of cognizable ethnic groups. Although the Court of Special Appeals spent considerable effort exploring what "Hispanic" means,[48] whether the defendant and stricken venireperson were shown to be Hispanic,[49] and whether the rest of the venire panel were shown not to be Hispanic,[50] the Court of Appeals recognized simply that Hispanics are clearly a cogni-

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objection has standing as a third party to assert the equal protection rights of such excluded venirepersons. *Id.* at 415. Thus, the Court focused on the violation of the equal protection rights of the excluded juror, not of the defendant. *See id.* at 409-10.

46. Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077 (1991). In addition to holding, as did the *Powers* Court, *see supra* note 45, that race-based peremptory strikes violate the equal protection rights of prospective jurors, *Edmonson*, 111 S. Ct. at 2080, and that the party contesting an opponent's use of peremptory strikes may raise the constitutional claim on behalf of the excluded venireperson, *id.* at 2087, the *Edmonson* Court held that a private litigant's exercise of peremptory strikes in effect constitutes state action because it concerns the exercise of a right having its source in state law. *Id.* at 2082-83 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). Thus, the court determined that a private party can be described in all fairness as a state actor. *Id.* at 2083. The private litigant exercising peremptory strikes makes extensive use of state procedures with the "overt, significant assistance of state officials." *Id.* at 2084 (quoting Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988)). Furthermore, the exercise of peremptory strikes involves a traditional function of the government, since the strike is used to select a jury, an entity that is essentially a governmental body. *Id.* at 2085.

47. Georgia v. McCollum, 112 S. Ct. 2348 (1992). The Court held that a defendant's exercise of peremptory strikes constitutes state action for the reasons discussed in *Edmonson*, *see supra* note 46, even though the defendant stands in opposition to the government. *McCollum*, 112 S. Ct. at 2354-57. The defendant's constitutional rights to a fair trial are not violated because "it is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Id.* at 2358.

48. Mejia v. State, 90 Md. App. 31, 43-44, 599 A.2d 1207, 1213, *rev'd*, 328 Md. 522, 616 A.2d 356 (1992).

49. *Id.* at 44-45, 599 A.2d at 1213-14. The court properly noted, however, that under Powers v. Ohio, 111 S. Ct. 1364 (1991), it was not essential that Mejia show that he was Hispanic because it is no longer required that the defendant and the excluded juror be of the same race. *Mejia*, 90 Md. App. at 45, 599 A.2d at 1214. *See supra* note 45 and accompanying text (discussing *Powers*).

50. *Mejia*, 90 Md. App. at 46-47, 599 A.2d at 1214-15.

zable group[51] and refused to address the substantive evidence regarding the individuals' ethnicity. It stated that whether an individual is a member of a cognizable group is a question of fact to be determined from the totality of the circumstances,[52] but was convinced from the record that the stricken venireperson was Hispanic and that he was the only Hispanic on the venire.[53] The defendant's counsel had specifically noted for the record that the stricken venireperson was the only venireperson with a Hispanic background,[54] and the State did not object to the defense's observation or make any observation of its own.[55]

According to the *Mejia* court, it is not determinative whether the individuals are shown by substantive evidence to be members of a cognizable ethnic group.[56] Rather, the common belief of the parties and the trial court is enough to support this element of the required prima facie showing.[57] Moreover, the moving party's claim that an individual is a member of such a group may be inferred from such factors as visual observations, surnames, or language.[58] If there is disagreement, the opposing party is required to respond accordingly.[59] If it fails to do so, the opposing party may be deemed to be in agreement.[60]

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51. *Mejia*, 328 Md. at 530, 537, 616 A.2d at 359-60, 363 (citing Hernandez v. New York, 111 S. Ct. 1859 (1991); Castaneda v. Partida, 430 U.S. 482 (1977)).

52. *Id.* at 534, 616 A.2d at 361.

53. *Id.* at 539, 616 A.2d at 364.

54. *Id.* at 537, 616 A.2d at 363; *see supra* note 11.

55. *Mejia*, 328 Md. at 538, 616 A.2d at 363-64.

56. *Id.* at 534, 616 A.2d at 362 ("Group membership is not always proven by specific and tangible evidence.").

57. *See id.* at 539, 616 A.2d at 364 ("We conclude that, where, as here, neither the State nor the court expressed any disagreement with the petitioner's proffer of the preliminary fact that a venireperson was the only Hispanic in the venire, a prima facie showing of that fact was made."). The *Mejia* court also noted that considerations of judicial economy require that courts not conduct full evidentiary hearings on questions of race which may not be in dispute. *Id.* at 538, 616 A.2d at 364; *see also* Stanley v. State, 313 Md. 50, 542 A.2d 1267 (1988) (not requiring evidence of the race of excluded venirepersons when the parties were in agreement as to their race). *But see* United States v. Esparsen, 930 F.2d 1461 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992) (rejecting the defendant's *Batson* objection because the defendant did not sufficiently establish the Hispanic identity of the stricken venirepersons).

58. *Mejia*, 328 Md. at 535, 616 A.2d at 362. The moving party should state with particularity the bases for its conclusion, giving the opposing party an opportunity to make similar observations and respond to the movant's contention. *Id.* at 535 n.8, 616 A.2d 362 n.8.

59. *Id.* at 536, 616 A.2d at 362.

60. *Id.* at 535-36, 616 A.2d at 362. Without a response, the moving party may assume that the nonmovant is in agreement, and the movant may therefore forego the offer of additional proof. *Id.* The court analogized this situation to the more general evidentiary

Having determined that the parties were in agreement as to the stricken venireperson's ethnic background in *Mejia*, the court held that the defendant had made a prima facie showing of "that fact."[61] It further held that when, as in *Mejia*, the record reveals that the prosecutor struck the only venireperson of a particular cognizable group, the defendant's burden of making a prima facie showing of purposeful discrimination is automatically satisfied.[62] The court noted that, in such cases, the prosecution has effectively excluded an entire racial or ethnic group with just one strike.[63]

The only remaining issue the *Mejia* court faced was determining the appropriate remedy. Rather than simply granting the defendant a new trial, the court remanded the case to give the State an opportunity to offer a neutral explanation for its strike.[64] Since the trial judge rejected the defendant's *Batson* objection without requiring a response from the State,[65] fairness dictated that the State be permitted to respond before the trial court considered whether to grant a new

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rule concerning an admission by silence. *Id.* at 536-37, 616 A.2d at 363. The requirements of such a "tacit admission" are as follows:

> (1) the party heard and understood the other person's statement; (2) at the time, the party had an opportunity to respond; (3) under the circumstances, a reasonable person in the party's position, who disagreed with the statement would have voiced that disagreement.

Henry v. State, 324 Md. 204, 242, 596 A.2d 1024, 1043 (1991) (quoting 6 LYNN MCLAIN, MARYLAND EVIDENCE § 801(4).3 (1987)).

61. *Mejia*, 328 Md. at 539, 616 A.2d at 364.

62. *Id.*

63. *Id.*

64. *Id.* at 541, 616 A.2d at 365. The exact procedure on remand was described in Stanley v. State, 313 Md. 50, 542 A.2d 1267 (1988). *Mejia*, 328 Md. at 541, 616 A.2d at 365. The *Stanley* court granted a limited remand to permit the State an opportunity to present a race-neutral explanation for its peremptory strikes. *Stanley*, 313 Md. at 92, 542 A.2d at 1287. Its description of the procedure was as follows:

> [T]he State is to present, if it can, honest, neutral, nonracial reasons for the challenges of each black potential juror who was stricken. Any reasons presented must be legitimate, clear and reasonably specific, as general assertions of assumed group bias or broad denials of discriminatory motives will be insufficient to overcome the defendant's prima facie cases. The reasons must be tailored to the particular facts of the case that was tried and related to the individual traits of the jurors. The defendant will be afforded the opportunity to rebut any explanations put forth by the prosecutor and to expose any justification that on its face may appear racially neutral, but is in reality a sham or pretext. The trial court must then articulate a clear ruling detailing the basis on which it was made, and explaining whether the established prima facie case of purposeful discrimination has been overcome by the State.

Id., 542 A.2d at 1287-88. If the trial court is not satisfied with the State's explanations, a new trial should be granted on all charges. *Id.* at 92-93, 542 A.2d at 1288.

65. *Id.* at 528, 616 A.2d at 359.

trial.[66] Recognizing, however, that nearly two years had passed since the trial,[67] the court stated that, if the circumstances of the voir dire proceedings could not be reconstructed adequately, the trial judge may order a new trial.[68]

4. Analysis.—In *Mejia*, the Court of Appeals addressed the question of what proof of ethnic identity is required to satisfy a criminal defendant's prima facie showing of purposeful discrimination by the prosecution in exercising its peremptory strikes.[69] In upholding Mejia's conviction, the Court of Special Appeals seemed to hold that a prima facie showing requires a defendant to *prove* each component of the prima facie case.[70] Specifically, the intermediate appellate court stated that "[w]hen a party is allocated the burden of establishing a prima facie case as to a proposition, *establishing* the necessary set of predicate facts involves more than simply *proclaiming* those facts."[71] Thus, the Court of Special Appeals felt compelled to define the meaning of "Hispanic" and comb the record for *proof* that Mejia and Estrada were Hispanic and that the rest of the venire was not Hispanic.[72]

Although Mejia did no more than proclaim that Estrada was the only Hispanic on the venire, the Court of Appeals deemed his proclamation a sufficient showing because neither the prosecution nor the court objected to it.[73] Because the defense was not put on notice by the prosecutor or trial judge that the ethnic identity of Estrada or the rest of the venire was in dispute, the defense reasonably assumed that it was not in question and did not present an offer of proof.[74] Had the State objected to the defense's characterization of Estrada's ethnic identity, the defense would have been required to offer the basis for

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66. *Id.* at 541, 616 A.2d at 365.

67. *Id.* at 540-41, 616 A.2d at 365. The court noted that the *Stanley* court had granted the hearing after a lapse of about two years and, in State v. Gorman, 324 Md. 124, 596 A.2d 629 (1991), the court had done so after more than six years. *Mejia*, 328 Md. at 540, 616 A.2d at 365.

68. *Mejia*, 328 Md. at 541, 616 A.2d at 365.

69. *Id.* at 525, 616 A.2d at 357. Because the right to make a *Batson*-type objection has now been extended to a criminal prosecutor and civil litigants, *see supra* notes 46-47 and accompanying text, the *Mejia* holding will presumably apply in these contexts as well.

70. Mejia v. State, 90 Md. App. 31, 34-37, 599 A.2d 1207, 1208-10, *rev'd*, 328 Md. 522, 616 A.2d 356 (1992). The court relied heavily on the wording of prior Maryland *Batson* cases stating that, in raising a *Batson* objection, the defendant has the burden of proving the existence of purposeful discrimination by a preponderance of the evidence. *Id.* at 37, 599 A.2d at 1210 (citing Stanley v. State, 313 Md. 50, 542 A.2d 1267 (1988); State v. Gorman, 315 Md. 402, 554 A.2d 1203 (1991)).

71. *Id.* at 34, 599 A.2d at 1208.

72. *See supra* notes 48-60 and accompanying text.

73. *Mejia*, 328 Md. at 539, 616 A.2d at 364.

74. *See supra* notes 59-60 and accompanying text.

its beliefs.[75] Recognizing that what is not said in the course of litigation may be as important as what is said when judging the totality of the circumstances,[76] the court held that, under the circumstances, Mejia's proclamation constituted a sufficient offer of proof.[77]

Prior to *Mejia*, courts had recognized that a prima facie showing of discrimination was made when a prosecutor used peremptories to exclude from a jury *all* of the members of a given ethnic or racial group,[78] even if there was only one member of the group on the panel.[79] If, however, there were several Hispanics in the venire, and only one was struck, a reviewing court would probably defer to the finding of the trial judge. Although the Court of Appeals has stated that each and every peremptory strike is subject to *Batson* review[80] and that the final makeup of the jury is irrelevant,[81] it is equally well established that whether a prima facie showing has been made is a question of fact for the trial judge, to whom great discretion is afforded.[82] If Mejia's counsel had not stated that Estrada appeared to be the only Hispanic on the venire, the court may not have found the parties to have been in agreement regarding the issue and may have been more likely to defer to the judgment of the trial judge, who rejected the defendant's argument.[83]

The court's holding in *Mejia* will limit the evidence required during a *Batson* objection to matters truly in dispute and dispense with argument where issues, such as a venireperson's race or ethnicity, are not in controversy. This limitation is appropriate for reasons of judicial economy. If the court had adopted the State's argument, future trial courts may have been forced to require the defense to give an

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75. *Id.*

76. *See Mejia*, 328 Md. at 538, 616 A.2d at 363-64 ("Just as what the prosecutor may say or ask during voir dire may be relevant, in the totality of the circumstances, to determining the prosecutor's motive in exercising peremptories, what the prosecutor does not say in the face of an assertion of fact is quite important on the question of the adequacy of the petitioner's *Batson* showing.").

77. *Id.* at 539, 616 A.2d at 364.

78. *Id.* at 539-40, 616 A.2d at 364; *see* Stanley v. State, 313 Md. 50, 85-87, 542 A.2d 1267, 1284-85 (1988) (citing cases).

79. *See Stanley*, 313 Md. at 84-85, 542 A.2d at 1283-84 (citing cases).

80. *Id.* at 93, 542 A.2d at 1288 ("A new trial will be mandated if any one of the peremptory challenges . . . was exercised with a discriminatory purpose . . . ."); Tolbert v. State, 315 Md. 13, 22, 553 A.2d 228, 232 (1989).

81. *Tolbert*, 315 Md. at 22, 553 A.2d at 232.

82. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986) ("We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination . . . .").

83. *See supra* notes 14-18 and accompanying text.

explanation of a venireperson's race or ethnicity every time it raised a *Batson* objection, even if the race or ethnicity of the excluded venireperson was obvious and the state was in complete agreement. Given the overwhelming expansion of *Batson*—to include *all* parties in both criminal and civil trials, to encompass a broad array of racial or ethnic groups, and to no longer require that stricken jurors and the defendant be of the same race or ethnicity[84]—the amount of time and resources wasted in litigating these uncontested issues could be extraordinary.

The *Mejia* decision, however, is not without potential flaws. By permitting the defendant to satisfy his prima facie showing without any substantive evidence of ethnic identity, the court risks incorrect identification when parties wrongly believe that stricken jurors are members of a certain group. A venireperson's physical appearance and name might lead one to conclude erroneously that the person is of a certain race or ethnicity, when in fact he is not. If the opposing party or the court states nothing in response, a *Batson* objection might be sustained when there is no basis in fact for the objection. Given the broad array of racial and ethnic groups to which *Batson* has been held to apply, the possibility of such an occurrence is not remote.

The *Mejia* court's choice of remedy, a limited remand to allow the State to present its neutral, nondiscriminatory explanations, was proper and in accord with prior Maryland *Batson* cases.[85] In the past, the Court of Appeals has allowed new trials in *Batson* cases only when the State had been permitted an opportunity to present neutral explanations for its strikes and the court was not satisfied with its explanations.[86] It is indeed possible in *Mejia* that the prosecution could have offered an acceptable neutral, nondiscriminatory explanation had it been given the chance,[87] and granting a new trial without affording

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84. *See supra* notes 42-47 and accompanying text.

85. *See, e.g.*, State v. Gorman, 324 Md. 124, 596 A.2d 629 (1991); Stanley v. State, 313 Md. 50, 542 A.2d 1267 (1988); Trice v. State, 313 Md. 50, 542 A.2d 1267 (1988) (companion case to *Stanley*).

86. *See, e.g.*, Chew v. State, 317 Md. 233, 562 A.2d 1270 (1989); Tolbert v. State, 315 Md. 13, 553 A.2d 228 (1989).

87. The *Mejia* case presented a situation much like that in Hernandez v. New York, 111 S. Ct. 1859 (1991), in which an Hispanic defendant objected to the prosecution's strikes of two Hispanic venirepersons. *Id.* at 1864. The prosecutor stated that he struck the individuals because he felt that they might not be able to follow the interpreter. *Id.* The defendant claimed that the Spanish-speaking ability bore a close relationship to ethnicity, and the strikes therefore violated the Equal Protection Clause. *Id.* at 1866. The trial judge rejected the defendant's argument, and the Supreme Court affirmed on the grounds that the prosecutor explained that the specific responses and the demeanor of the venirepersons, when asked if they could defer to the official translation, caused him to doubt their ability to defer. *Id.* at 1867. Because this explanation did not rely purely on the ability to speak a

the State such an opportunity might grant the defendant a windfall to which he is not entitled. Mejia might still have his new trial, but as the court recognized, this determination properly should be left to the trial judge.[88]

5. Conclusion.—In holding that the defendant in *Mejia* successfully presented a prima facie *Batson* objection,[89] the Court of Appeals eased the requirements that a defendant must meet to show the racial or ethnic identity of a stricken venireperson. By refusing to require the defendant to present tangible proof of race or ethnicity when the opposing party seems to be in agreement on the point, the court limited the evidence that must be presented during *Batson* cases strictly to matters in dispute. The court appropriately noted that if the State disagrees with the defense's assertion of a juror's race or ethnicity, it must state its disagreement for the record in order to require an offer of proof by the defense. Given the recent expansion of the *Batson* doctrine, the decision is also desirable for reasons of judicial economy.

CHARLES J. KRESSLEIN

D. Due Process Rights of Inmates Improperly Denied Parole

In *Patuxent Institution Board of Review v. Hancock*,[1] the Court of Appeals held that an inmate, who had been placed on parole but not yet released from confinement, could not have his release denied on the basis of conduct that he had no notice could be grounds for revocation.[2] In so holding, the court made the technical award of parole, rather than the actual release, a key event in the parole process. It concluded that inmates who have been awarded parole enjoy a liberty interest worthy of due process protection even before they are released from confinement.

1. The Case.—In January 1977, Clarence J. Hancock was delivered into the custody of the Division of Corrections for a sentence of

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language, the Court accepted the explanation as race-neutral. *Id.* The Court further stated that the mere fact that a basis for peremptory strikes has a disproportionate impact on a certain racial or ethnic group does not necessarily show discriminatory intent, *see id.* at 1867-68, and that deference should be given to trial judges. *Id.* at 1868-69.

88. *See supra* notes 66-68 and accompanying text.

89. *See Mejia*, 328 Md. at 539, 616 A.2d at 364.

1. 329 Md. 556, 620 A.2d 917 (1993).

2. *Id.* at 589, 620 A.2d at 933.

life imprisonment plus thirty-five years.[3] In April 1977, he was classified as a "defective delinquent"[4] and transferred to the Patuxent Institution.[5] He was approved there for accompanied day leave in 1984, and in 1985 he began participating in work-release and school-release programs.[6] In 1987, the Patuxent Institution Board of Review (Board) recommended Hancock for parole.[7] He was not released because the Governor refused to approve his parole[8] as required by a 1982 statute.[9] In 1990, the Board returned Hancock to the general prison population because his "behavior had become 'unbefitting [of] continued participation in the program and services' of Patuxent Institution."[10]

On June 7, 1990, the Court of Appeals held that the 1982 statute requiring gubernatorial approval for parole could not be applied against inmates at the Patuxent Institution who committed offenses prior to the effective date of the statute.[11] Relying on this decision, Hancock filed a writ of habeas corpus in the Circuit Court for Baltimore City challenging the Governor's refusal to approve his parole.[12]

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3. *Id.* at 562, 620 A.2d at 920. Hancock was convicted of breaking into the home of a female acquaintance with the intention of tying up her three children and raping her when she arrived home. He had bound only one of the children when the intended victim arrived. Hancock then bound and gagged her. When the victim removed her gag and began screaming, Hancock beat her with a hammer, and she later died. Hearing the victim's cries, her 11-year-old son came to her aid. Hancock struck the child 27 or 28 times, inflicting permanent brain damage. *Id.* at 597, 620 A.2d at 937.

4. "Defective delinquent" was a statutory term used to describe individuals with a "propensity toward criminal activity" who had either an "intellectual deficiency" or an "emotional imbalance" so as to require confinement and treatment. *Id.* at 562 n.2, 620 A.2d at 920 n.2. The statute that created the "defective delinquent" classification was repealed in 1977, but Hancock remained at the Patuxent Institution as an "eligible person." An "eligible person" is one who (1) is convicted of a crime, (2) has "an intellectual deficiency or emotional imbalance," (3) is likely to respond favorably to the Patuxent Institution's treatment programs, (4) can be better rehabilitated at the Patuxent Institution than through other incarceration, and (5) meets the eligibility criteria established by the Secretary of Public Safety and Correctional Services. *See id.*; MD. ANN. CODE art. 31B, § 1(f)(1) (1990).

5. The Maryland General Assembly created the Patuxent Institution in 1951 "to provide efficient and adequate programs and services for treatment with the goal of rehabilitation of eligible persons." MD. ANN. CODE art. 31B, § 2(b) (1990).

6. *Hancock*, 329 Md. at 562-63, 620 A.2d at 920.

7. *See id.* at 563, 620 A.2d at 920.

8. *Id.*, 620 A.2d at 921.

9. *See id.* The statute provided that "[a]n eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor." *Id.* at 563 n.5, 620 A.2d at 920 n.5 (citing MD. ANN. CODE art. 31B, § 11(b)(2) (1983)). Currently, this language is contained in article 31B, § 11(b)(3) (1990).

10. *Id.* at 564, 620 A.2d at 921.

11. *See* Gluckstern v. Sutton, 319 Md. 634, 672, 574 A.2d 898, 916, *cert. denied sub nom.* Henneberry v. Sutton, 498 U.S. 950 (1990).

12. *Hancock*, 329 Md. at 564, 620 A.2d at 921.

The court agreed that the 1982 statute could not be applied against Hancock and ordered the Board to parole Hancock on or before August 10, 1990.[13] It also ruled, however, that the Board need not release Hancock if it commenced procedures to revoke his parole before August 10, 1990.[14]

Pursuant to the court's order, the Board issued Hancock an Order of Parole for the period between August 8, 1990 and August 2, 1991.[15] General Condition #3 of the parole order provided that "[t]he parolee shall not commit any act which would be a violation of any Federal, State Law or Municipal ordinance; and shall conform to all rules of conduct imposed upon him by the Patuxent Institution or authorized representative."[16] At the same time, the Board served Hancock a Preliminary Hearing Notice and a Request for Parole Revocation Warrant alleging violations of General Condition #3.[17] The basis of the alleged violation was Hancock's refusal to participate fully in treatment and counseling sessions during the preceding year.[18]

At Hancock's preliminary hearing, the Board found probable cause to believe that he had violated the terms of his parole and ordered him detained at the Patuxent Institution pending a formal parole revocation hearing.[19] At the formal hearing, the Board found that Hancock had "'failed to comply with the instructions'" of his therapist and revoked his parole.[20]

Hancock appealed the Board's decision to the Circuit Court for Howard County, which affirmed.[21] In an unreported opinion, the Court of Special Appeals reversed, holding that Hancock's due process rights were violated when the Board revoked his parole for breaking a parole condition of which he lacked notice.[22] The Board filed a petition for certiorari to the Court of Appeals, along with a motion to

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13. *Id.* at 565, 620 A.2d at 921.

14. *See id.*

15. *See id.* at 566, 588, 620 A.2d at 922, 933.

16. *Id.*, 620 A.2d at 922.

17. *Id.* at 566-67, 620 A.2d at 922.

18. *Id.* at 567, 620 A.2d at 922.

19. *Id.*

20. *Id.* Dr. Farrell, an institutional psychologist who conducted group therapy with Hancock, testified at the formal revocation hearing that Hancock became "evasive and general" in response to questions and had not progressed as far as expected. *Id.* Based on his observations, Dr. Farrell recommended against releasing Hancock into the community. *Id.*

21. *Id.* at 567-68, 620 A.2d at 922-23.

22. *Id.* at 568, 620 A.2d at 923.

stay effectuation of Hancock's release.[23] The Court of Appeals granted both the petition and the motion.[24]

2. Legal Background.—Parole is a matter of legislative grace and not a constitutional right.[25] A state is under no obligation to establish a parole system, nor does the mere creation of one give rise to a protectable interest in the possibility of parole.[26] Inmates can, however, acquire a reasonable entitlement to parole and a protectable liberty interest therein if the wording of a state's parole statute creates an expectancy of release[27] or if the inmate actually has been placed on parole.[28]

a. Liberty Interest Conferred by Parole Statute: The Greenholtz/Allen *Standard.*—In *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,*[29] the Supreme Court held that the Nebraska parole statute created a protectable liberty interest because it created a presumption of release.[30] In support of its holding, the Court pointed to the statute's statement that the Board of Parole *shall* grant parole unless it finds one or more statutory considerations present.[31] Similarly, in *Board of Pardons v. Allen,*[32] the Court found a protectable liberty interest under a Montana statute that stated that the State Board of Pardons *shall* release an inmate on parole when the board concludes there will be no detriment to the prisoner or the community.[33] In so holding, the Court distinguished between two types of parole board discretion. When a parole board has broad discretion in determining

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23. *Id.*

24. *Id.*

25. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 488 (1980); Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 7 (1979); Alston v. Robinson, 791 F. Supp. 569, 583 (D. Md. 1992); Belch v. Raymond, 196 Md. 649, 650, 75 A.2d 96, 97 (1950).

26. *See* Board of Pardons v. Allen, 482 U.S. 369, 373 (1987); Jago v. Van Curen, 454 U.S. 14, 19 (1981); *Greenholtz*, 442 U.S. at 11.

27. *See Allen*, 482 U.S. at 381; *Greenholtz*, 442 U.S. at 12.

28. Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee . . . .").

29. 442 U.S. 1 (1979).

30. *See id.* at 12.

31. *Id.* at 12-13.

32. 482 U.S. 369 (1987).

33. *Id.* at 381. *Compare id.* (relying on the parole statute's mandatory language in finding a protectable liberty interest in parole) *and Greenholtz*, 442 U.S. at 12 (holding that the mandatory language of the parole statute created a presumption of release) *with* Van Curen v. Jago, 641 F.2d 411, 414-15 (6th Cir.) (holding that no liberty interest was conferred by an Ohio statute that stated that the parole board *may* parole inmates if five statutory considerations exist), *rev'd on other grounds*, 454 U.S. 14, 21 (1981).

whether prescribed considerations exist *and* whether the board should grant parole in light of those considerations, no liberty interest is conferred because the subjective nature of the proceedings does not create any presumption or reasonable expectation of release.[34] On the other hand, when a parole statute gives a board discretion in determining the existence of prescribed conditions, but mandates the board's decision upon a finding of those conditions, the statute confers a protectable liberty interest in receiving parole.[35]

In Maryland, the parole eligibility of inmates housed at the Patuxent Institution is determined by the Patuxent Institution Board of Review.[36] If the Board determines that an eligible inmate will not pose an unreasonable risk to society and that parole will assist in the inmate's rehabilitation, the Board *may* grant parole.[37] The Maryland Parole Commission, which determines parole eligibility for the general prison population, similarly has an exclusive power to authorize parole.[38] Although the Maryland Regulations set out the general criteria that the Parole Commission considers when deciding whether to grant parole,[39] the Commission is not bound by any language mandating a particular decision based on those criteria.[40] Federal Courts and the Maryland Court of Special Appeals have explicitly held that the Maryland parole statute does not create a protectable liberty interest because it gives the Parole Commission unfettered discretion.[41] Prior

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34. *Allen*, 482 U.S. at 375-76.

35. *Id.*

36. MD. ANN. CODE art. 31B, § 11(b) (1990).

37. *Id.* In 1989, the General Assembly amended article 31B, § 11, eliminating mandatory language that stated that the Board *shall* approve parole if prisoners satisfy the statutory considerations. Section 11 now states that the Board *may* grant parole when inmates satisfy the statutory considerations. *Id.* The change, which, under a *Greenholtz* analysis, eliminated any liberty interest in parole, has withstood a challenge in federal court claiming it constituted an *ex post facto* application of law. *See* Alston v. Robinson, 791 F. Supp. 569, 592 (D. Md. 1992).

38. MD. ANN. CODE art. 41, § 4-504 (1990).

39. The Maryland Parole Commission considers 12 sources of information and uses eight criteria in determining whether to grant parole. MD. REGS. CODE tit. 12, § 08.01.18A.

40. In setting out the Parole Commission's operating procedures and criteria, both the Code and Regulations explicitly affirm that the Parole Commission enjoys exclusive power to decide such matters. MD. ANN. CODE art. 41, § 4-504 (1990); MD. REGS. CODE tit. 12, § 08.01.18A.

41. Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988) ("[T]he Maryland parole statute does not create a legitimate expectation of parole release."); Braxton v. Josey, 567 F. Supp. 1479, 1481 (D. Md. 1983) (providing that the use of a parole guideline did not limit the parole board's discretion so as to create a protectable liberty interest); Simms v. State, 65 Md. App. 685, 689-90, 501 A.2d 1338, 1341 (1986) (holding that the Parole Commission, in the exercise of its discretion, may choose to follow or ignore particular items set out as general parole criteria).

to *Hancock,* the courts had not specifically addressed the issue of whether inmates at the Patuxent Institution have a statutorily conferred liberty interest, but the statute's nonmandatory language and explicit vesting of discretion in the Board made it unlikely that they would so hold under the *Greenholtz/ Allen* standard.

b. Liberty Interest Conferred by Actual Release: The Morrissey *Standard.*—In *Morrissey v. Brewer,*[42] the Supreme Court held that, although the existence of a state parole system does not confer a liberty interest upon the state's inmates, a prisoner's expectation of parole becomes a protectable interest once the inmate actually is released.[43] The due process afforded in connection with such a liberty interest depends not merely on whether the benefit is a right or a privilege, but on the extent to which the individual will suffer grievous loss as a result of its denial.[44] Though parole is not the unconditional freedom that the general populace enjoys, it is nonetheless valuable enough to fall within the purview of the Fourteenth Amendment.[45]

Consistent with its view that parolees possess a liberty interest because depriving them of the conditional freedom they have already enjoyed would result in a grievous loss, the Supreme Court held in *Jago v. Van Curen*[46] that prisoners who are merely awaiting release may be denied parole without any form of due process.[47] In *Jago,* the Court created a distinction between parole revocation, where the state seeks to remove a parolee from his already effectuated conditional release, and parole rescission, where the state refuses to release inmates whose parole has been approved but not effectuated.[48] The Court acknowledged that inmates suffer a loss when their approved parole is rescinded, but held that the approval of parole is a mutually explicit understanding between the inmate and the state that does not create a liberty interest.[49]

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42. 408 U.S. 471 (1972).

43. *See id.* at 482; *see also* Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 9 (1979) ("There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires.").

44. *Morrissey,* 408 U.S. at 481.

45. *Id.* at 482. The *Morrissey* Court noted several grievous losses that parolees may suffer upon revocation of their parole, including the loss of the right to be gainfully employed, the loss of the right to associate freely with family and friends, and losses occasioned by the parolee's reliance upon the state's implicit promise that parole will be revoked only upon the violation of a parole condition. *Id.*

46. 454 U.S. 14 (1981) (per curiam).

47. *Id.* at 21.

48. *See id.* at 17.

49. *Id.* at 17-20. Though mutually explicit understandings can create a *property* interest, *see, e.g.,* Perry v. Sindermann, 408 U.S. 593, 601 (1972) (holding that a nontenured profes-

c. The Process Due.—In *Greenholtz,* the Supreme Court held that states that confer liberty interests by virtue of their parole statutes satisfy the requirements of due process by affording inmates who are being considered for parole an opportunity to be heard at an informal interview hearing.[50] In the event of a decision against parole, the parole board must also inform the inmate of the reasons for the denial.[51]

When a state wishes to revoke a parole that has been effectuated, the parolee has a right to a much more extensive process. Under *Morrissey,* the state must give the parolee written notice of the claimed parole violations, disclose the evidence against him, afford him an opportunity to be heard by a neutral and detached body such as the traditional parole board, and permit him to appear in person, offer witnesses and documentary evidence, and confront and cross-examine adverse witnesses.[52] The state also must provide the parolee with a statement of the evidence it relied on if it decides to revoke the parole.[53] Most importantly, parole revocation must be based on a "willful or knowing violation of a condition of the parole."[54]

d. Remedy.—In *Gluckstern v. Sutton,*[55] the Court of Appeals held that a statutory amendment requiring gubernatorial approval for parole of inmates serving fifteen-year sentences could not be applied against inmates at the Patuxent Institution who committed their offenses prior to 1982.[56] In *Gluckstern,* the trial court ordered the Board to conduct a new parole hearing and consider only the facts and evidence in existence at the time the inmate's parole was improperly denied.[57] In the event the Board approved parole based on this

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sor at a public university was entitled to a hearing prior to the nonrenewal of a contract of 10 years, since the parties had a mutual understanding that job security attached after 7 years), they cannot create a *liberty* interest in parole release. *See Jago,* 454 U.S. at 20.

50. Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 15 (1979).

51. *Id.*

52. Morrissey v. Brewer, 408 U.S. 471, 489 (1972). The right of confrontation may be denied upon a showing of good cause. *Id.* Though the Supreme Court did not mandate parole revocation hearings until 1972, hearings have long been a requirement for parole revocation in Maryland. *See* MD. ANN. CODE art. 41, § 101 (1951).

53. *Morrissey,* 408 U.S. at 489.

54. *Id.* at 482 (noting that the state implicitly promises not to revoke parole unless the parolee violates a parole condition); *see also* Bergstein v. State, 322 Md. 506, 516, 588 A.2d 779, 784 (1991).

55. 319 Md. 634, 574 A.2d 898 (1990).

56. *Id.* at 672, 574 A.2d at 916 (holding that retroactive application of the 1982 statute was an *ex post facto* application of law because it adversely affected inmates' prospects for parole).

57. *Id.* at 646, 574 A.2d at 904.

evidence, the Patuxent Institution could then seek revocation of parole based on the inmate's conduct *after* the date of the original improper denial of parole.[58] As long as the Patuxent Institution applied for revocation immediately after the ordered hearing, it was not obligated to physically release the inmate until completion of the revocation proceedings.[59] Because neither party questioned the propriety of the relief on appeal, the Court of Appeals did not reach the issue of whether this procedure was an appropriate remedy for an improper denial of parole.[60]

3. The Court's Reasoning.—In *Hancock,* the Court began by examining when, if ever, Hancock acquired a liberty interest in parole. Stressing the deference normally given the Maryland Parole Commission and the Patuxent Institution Board of Review,[61] the Court impliedly rejected any argument that inmates acquire a liberty interest by virtue of the Maryland parole statute.[62] The court also determined that Hancock did not acquire a protectable interest when the Board recommended his parole in 1987.[63] Because the 1987 recommendation did not physically effectuate parole, the court held that Hancock had no right to the due process protection afforded actual parolees, even though the only obstacle to his release turned out to be invalid as applied to Patuxent Institution inmates who committed their offenses prior to 1982.[64] The court did, however, find the conferral of a liberty interest in the Board's compliance with the Baltimore City Circuit Court's 1990 order to grant parole, even though Hancock was not released and received a parole revocation warrant at the same time.[65]

Having established that Hancock's 1990 parole order conferred on him a protectable liberty interest, the court next discussed the process that he was due. Although the Board complied with the hearing requirements announced in *Morrissey,*[66] the court found the revoca-

58. *Id.* at 647, 574 A.2d at 904.

59. *Id.*

60. *Id.*

61. *Hancock,* 329 Md. at 573-74, 620 A.2d at 926 (noting that although the Parole Commission ordinarily has exclusive discretionary power to authorize parole, the Board of Review has that power with regard to prisoners at the Patuxent Institution).

62. *See id.*

63. *Id.* at 584, 620 A.2d at 931.

64. *Id.* Hancock arguably realized at the time of his parole recommendation that Maryland law required gubernatorial approval. Thus, Hancock could not have justifiably relied on a presumption that the Board's recommendation would translate into an order of parole. *Id.* The Board's recommendation merely gave Hancock a hope of eventual release, which does not constitute a liberty interest. *Id.*

65. *Id.* at 584-85, 620 A.2d at 931.

66. *See supra* notes 52-54 and accompanying text.

tion of Hancock's parole unconstitutional based on the principles of notice.[67] Hancock received his Order of Parole on August 8, 1990, the same day he received his parole revocation warrant. Thus, Hancock's revocation was based on violations of parole conditions of which he was not aware until the day he was served with the revocation warrant.[68] Furthermore, the alleged parole violation occurred in the year *prior* to issuance of the Order of Parole.[69] The court held that Hancock's parole could not be revoked constitutionally for misconduct that occurred before he was placed on parole or before he received notice that the conduct was proscribed.[70] Because the Board had violated Hancock's due process rights with regard to notice, the 1990 revocation of his parole was unconstitutional.[71]

The court determined that the appropriate remedy was effectuation of the parole ordered on August 8, 1990.[72] It also held, however, that while Hancock could not have his parole revoked for noncriminal misconduct that occurred before August 8, 1990, the Board was free to determine whether he had violated the law or its institutional equivalent *after* he received the Order of Parole.[73] In the event that the Board found evidence of such misconduct, the Board need not release Hancock until resolution of the revocation procedures.[74]

Judge McAuliffe, writing for the dissent, opined that Hancock had violated two implicit conditions of his parole of which he had adequate notice.[75] The dissent found implicit parole conditions in the requirement that parolees do not pose an unreasonable risk to society and the limitation on the Board's jurisdiction to prisoners con-

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67. *Hancock*, 329 Md. at 589, 620 A.2d at 933.

68. *See id.* The court indicated that Hancock had at least constructive notice that his parole could be revoked if he committed a criminal offense or its institutional equivalent. *Id.* at 590, 620 A.2d at 934. If the Board had revoked Hancock's parole because he committed a crime before the receipt of the revocation warrant, revocation would have been proper. The court did not believe, however, that Hancock reasonably should have known that active participation in his treatment program was a condition of his parole. *See id.* at 590 & n.18, 620 A.2d at 934 & n.18.

69. *See id.* at 589, 620 A.2d at 933.

70. *Id.* at 576-77, 589, 620 A.2d at 927, 933.

71. *See id.* at 589, 620 A.2d at 933.

72. *Id.* at 592, 620 A.2d at 935. An appropriate remedy at the trial level, according to the court, would have been an order for a new parole hearing in which the Board would consider all the relevant facts known at the time of the improper denial of Hancock's parole. *Id.* at 582, 620 A.2d at 930 ("The trial court in this case did not order a new parole hearing even though it probably could have—much had changed since 1987 . . . and the Board undoubtedly perceived the respondent as no longer eligible for parole . . . .").

73. *See id.*

74. *Id.*

75. *Id.* at 596, 620 A.2d at 937.

fined at the Patuxent Institution.[76] Hancock's failure to respond to treatment concerning his brutal offenses made him a safety risk, and the dissent believed that Hancock surely understood that safety risks could not remain on parole.[77] Further, Hancock ostensibly understood that he could not be paroled by the Board or remain on parole under the Board's auspices unless he remained under the Board's jurisdiction.[78] His behavioral problems and subsequent transfer to the general prison population in 1990 effectively eliminated the Board's power to parole him. According to the dissent, the behavior that precipitated the transfer therefore violated a known condition of his parole.[79]

4. Analysis.—In holding that Hancock's liberty interest vested upon his 1990 receipt of an Order of Parole, the Court of Appeals made form, rather than substance, the basis of due process protection. The general rule that effectuation of parole gives rise to a protectable liberty interest is based not on the act of granting parole, but on the nature of the conditional freedom and the effect of revocation of that freedom.[80] The order of the Baltimore City Circuit Court, which the Court of Appeals relied on in deciding that the parole order it mandated conferred a protectable liberty interest, explicitly provided that the Board could deny Hancock's release if it undertook parole revocation measures at the time it issued the parole order.[81] Thus, Hancock was never assured of parole and enjoyed none of the benefits of freedom common to ordinary parolees. Hancock's position, rather, was similar to that of an inmate facing *rescission* of parole—his expectation of release was based on a mutually explicit understanding with the Board that he would be released if it determined that he had not violated any parole conditions.[82] The circum-

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76. *Id.*

77. *Id.* ("These are conditions so basic and fundamental that any reasonable person would be aware of such conditions.").

78. *See id.* at 596, 599, 620 A.2d at 937-38.

79. *See id.* at 599, 620 A.2d at 938.

80. Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 9 (1979) (distinguishing between parolees actually enjoying the benefits of conditional liberty and inmates who "are confined and thus subject to all of the necessary restraints that inhere in prison"); Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

81. *See Hancock*, 329 Md. at 565, 620 A.2d at 921.

82. *See supra* notes 48-49 and accompanying text. If the court based Hancock's liberty interest on his expectation of release rather than on the grievous loss he would suffer upon revocation, *see, e.g., Greenholtz*, 442 U.S. at 12, a more appropriate time for the liberty interest to attach might have been at the time of the trial court's order, which marked the beginning of Hancock's expectation of release. At the time of the trial court's order, the Board had two options: (1) release Hancock on parole, or (2) begin revocation proceed-

stances surrounding Hancock's parole order made his expectation of release and potential for grievous loss far different from that of the ordinary parolee. A constitutional test is relevant only in cases where the test is an accurate barometer of the underlying constitutional imperatives.[83] Hancock's situation was so far removed from that of the normal parolee that the application of the *Morrissey* rationale was inappropriate. The underlying premise of *Morrissey*, that the effectuation of parole is the key question because parolees on release stand to incur grievous loss if their liberty is curtailed,[84] simply was not the case in *Hancock*.

Moreover, the net effect of this decision may be a *loss* of due process rights by inmates who are improperly denied parole. The court spoke approvingly, for example, of a remedy giving an inmate who had suffered a wrongful denial of parole the right to a new parole hearing in which the parole authority could consider all the pertinent facts in determining anew the efficacy of parole.[85] Although dicta, this statement may lead to new parole hearings for inmates wrongfully denied their award of parole. In effect, the case may mean that inmates improperly denied parole will have the right only to a *parole hearing*, instead of a *parole revocation hearing*.

An inmate has far fewer due process rights in a parole hearing than does a parolee facing revocation of his parole. The Maryland Parole Commission and the Patuxent Institution Board of Review have unlimited discretion to approve or deny parole,[86] but to revoke a

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ings. At that point, Hancock had a chance of release without further inquiry. When Hancock received the Order of Parole, his expectation of release actually diminished because the simultaneous delivery of revocation papers alerted him that the Board was seeking to avoid releasing him. If the liberty interest attached in this manner, however, it would be an interest in release rather than in the maintenance of conditional freedom, and Hancock would be entitled to the limited process required in *Greenholtz*, *see supra* notes 50-51 and accompanying text, rather than the expanded protection mandated in *Morrissey*. *See supra* notes 52-54 and accompanying text.

83. *See* Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993) (stating that outcome determination is a defective test for prejudice in ineffective assistance of counsel cases when it ceases to answer accurately the underlying issue of whether the trial outcome was unfair or unreliable).

84. *See supra* notes 42-45 and accompanying text. The *Morrissey* test is grounded in the rights of parolees to enjoy gainful employment and limited freedom of movement and association. *Morrissey*, 408 U.S. at 482. Nowhere did the *Morrissey* Court indicate that the piece of paper granting parole has any significance in a due process inquiry other than its tendency to signify that the parolee had been enjoying the conditional liberties that the state seeks to revoke. Because he was never physically released pursuant to the parole order, Hancock never enjoyed any freedom of association or movement or the right to hold a job.

85. *Hancock*, 329 Md. at 582, 620 A.2d at 930; *see also* supra note 72.

86. MD. ANN. CODE art. 31B, § 11 (1990); art. 41, § 4-504 (1990).

parole, the relevant authority must point to particular conduct that violated an explicit provision in the parole order.[87] Inmates who are being considered for parole have no right to a formal hearing,[88] but parolees facing revocation have a right of confrontation at a formal hearing.[89] Thus, an inmate who suffers from an unconstitutional denial of parole in the future may be treated simply as a prisoner with a right to parole consideration, rather than as a parolee facing revocation of his conditional freedom.

5. Conclusion.—In *Hancock*, the Court of Appeals held that the technical effectuation of parole gives rise to a protectable liberty interest even before a prisoner is released. The decision may be less helpful to inmates than apparent, however, because the court also suggested that an appropriate remedy for an unconstitutional denial of parole before release is another parole hearing. Thus, inmates who are improperly denied parole before release may face the parole board as ordinary prisoners, who are afforded only limited due process protection, instead of as parolees, who enjoy much more expansive due process rights.

JOHN F. O'CONNOR

E. Striking Down Maryland's Cross Burning Statute

In *State v. Sheldon*,[1] the Court of Appeals held that Maryland's cross burning statute[2] unduly encroached upon the First Amendment right to free speech[3] by regulating conduct for the purpose of suppressing the expression of a viewpoint disfavored by the state.[4] In its evaluation of the statute, the court observed that the legislature's purpose in restricting cross burnings was to abate racial strife, rather than to contribute to the lessening of arson and fires, as the State initially claimed.[5] The court determined that such selective regulation of expressive conduct, based on disagreement with its message, contra-

87. *Morrissey*, 408 U.S. at 489. While inmates denied parole at a parole hearing might have a right to an explanation of why they were denied parole, *Greenholtz*, 442 U.S. at 15-16 (not deciding on whether an explanation is *required*), parole authorities do not have to specifically articulate the evidence upon which it made its discretionary determination. *Id.*

88. *See Greenholtz*, 442 U.S. at 16.

89. *Morrissey*, 408 U.S. at 489.

1. 332 Md. 45, 629 A.2d 753 (1993).

2. MD. ANN. CODE art. 27, § 10A (1992).

3. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

4. *Sheldon*, 332 Md. at 64, 629 A.2d at 763.

5. *Id.* at 55-56, 629 A.2d at 759.

venes the First Amendment.[6] According to the court, fostering racial harmony, however worthwhile a political objective, cannot be pursued by suppressing messages endemic to constitutionally protected conduct such as cross burning.[7]

1. The Case.—In *Sheldon*, the court adjudicated two separate prosecutions under Maryland's cross burning law. The first involved Brandon Forrest Sheldon, who burned a cross on the property of a black family in Prince George's County on October 17, 1991.[8] The second involved Thomas Eugene Cole, who burned a cross on state-owned property in the same county on March 29, 1992.[9] The two defendants were indicted under Maryland's cross burning statute, which provided:

> It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place. Any person or persons who violates the provisions of this section shall, upon conviction, be deemed guilty of a felony and shall suffer punishment for a period not to exceed 3 years or shall be fined an amount not to exceed $5,000 or shall suffer both such fine and imprisonment in the discretion of the court.[10]

Neither Cole nor Sheldon notified the area fire department or obtained the permission of the property owner prior to burning their respective crosses.[11]

On October 26, 1992, defendants Sheldon and Cole challenged their indictments in a joint hearing before the Circuit Court for Prince George's County.[12] They argued that the statute was unconstitutional on five separate grounds: (1) that it violated the free speech provision of the First Amendment on its face, (2) that, as applied, it violated the free speech provision, (3) that it violated the Establishment Clause of the First Amendment, (4) that it was unconstitutionally vague, and (5) that it was unconstitutionally overbroad.[13]

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6. *Id.* at 64, 629 A.2d at 763.
7. *Id.* at 63, 629 A.2d at 763.
8. *Id.* at 49, 629 A.2d at 755.
9. *Id.*, 629 A.2d at 756.
10. MD. ANN. CODE art. 27, § 10A (1992).
11. *Sheldon*, 332 Md. at 49, 629 A.2d at 755-56.
12. *Id.*, 629 A.2d at 756.
13. *Id.* at 49-50, 629 A.2d at 756.

The circuit court first held that although the burning of a cross denotes conduct as opposed to actual speech, the act is sufficiently expressive to qualify for First Amendment protection.[14] Second, the court held that Maryland's cross burning law was sufficiently related to the suppression of free expression to warrant strict judicial scrutiny.[15] Finally, the court determined that the statute could not withstand strict scrutiny[16] and that it fell within no doctrinal exceptions which would exempt it from rigorous First Amendment examination.[17] Accordingly, the circuit court struck down the statute as unconstitutional and granted the defendants' motions to dismiss their indictments.[18] The Court of Appeals granted certiorari before intermediate appellate review[19] and unanimously affirmed the decision of the circuit court.[20]

2. Legal Background.—Three widely recognized First Amendment principles directed the Court of Appeals's decision in *Sheldon:* (1) expressive conduct may constitute speech for First Amendment purposes,[21] (2) the government may not regulate conduct for the purpose of stifling certain messages,[22] and (3) any such regulation must be excised by the courts.[23] With respect to the first principle, the Supreme Court has long recognized that certain expressive conduct is encompassed by the First Amendment.[24] In 1931, the Court struck down a phrase in a California statute that forbade the expression of "'opposition to organized government'" by displaying "'any flag, badge, banner, or device.'"[25] The Court reasoned that the California statute was aimed at suppressing the free communication of political views and, therefore, could not be upheld as a regulation of noncom-

14. State v. Sheldon, Nos. 92-0081A & 92-0817X, slip op. at 5-6 (Cir. Ct. P.G. County Nov. 24, 1992).

15. *Id.*, slip op. at 9.

16. *Id.*, slip op. at 9-12.

17. *Id.*, slip op. at 12-15.

18. *Id.*, slip op. at 15.

19. *Sheldon*, 332 Md. at 50, 629 A.2d at 756.

20. *Id.* at 64, 629 A.2d at 763.

21. *See id.* at 51, 629 A.2d at 736.

22. *See id.* at 53, 629 A.2d at 757.

23. *See id.*

24. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding that the burning of a flag in a political demonstration constituted expressive conduct subject to First Amendment protection); Spence v. Washington, 418 U.S. 405 (1974) (per curiam) (holding that the display of a flag bearing a peace symbol conveyed a message of disapproval with U.S. involvement in Vietnam and, thus, implicated First Amendment free speech rights).

25. Stromberg v. California, 283 U.S. 359, 361 (1931) (quoting CAL. PENAL CODE § 403.a (West 1919) (repealed 1933)).

municative conduct.[26] In *Spence v. Washington*,[27] the Court again construed conduct as speech in a case involving a Washington State "improper use" statute that prohibited the display of flags with extraneous material such as peace symbols.[28] In *Spence*, the Court reviewed the prosecution of a peace activist for hanging a flag bearing a peace symbol out of a window in his residence.[29] Acknowledging that the flag display was meant to express opposition to United States' military involvement in Vietnam and that no compelling state interest could justify the prohibition of such displays, the Court found the statute "unconstitutional as applied to appellant's activity."[30] The Court equated the flag display with protected speech, explaining that its "message was direct, likely to be understood, and within the contours of the First Amendment."[31]

In *Texas v. Johnson*,[32] the Supreme Court again affirmed the principle that the First Amendment encompasses communicative conduct. In *Johnson*, the Court held that the burning of an American flag on public property as part of a political rally expressed an unmistakable ideological message of disapproval with government policy.[33] Finding the absence of a compelling state interest that justified the banning of flag burning and the suppression of the inherent political message,[34] the Court affirmed a state court finding that the statute, as applied in *Johnson*, was unconstitutional.[35] As the opinion noted, the First Amendment's "protection does not end at the spoken or written word. . . . Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'"[36]

The second First Amendment principle noted in *Sheldon* provides that government cannot regulate conduct for the purpose of suppressing ideological messages, but may incidentally regulate speech.[37] In *United States v. O'Brien*,[38] the Supreme Court upheld the conviction of an activist who burned his official military draft card to express op-

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26. *Id.* at 369-70.
27. 418 U.S. 405 (1974) (per curiam).
28. *See id.* at 407.
29. *Id.* at 405.
30. *Id.* at 414.
31. *Id.*
32. 491 U.S. 397 (1989).
33. *Id.* at 411.
34. *Id.* at 420.
35. *Id.* at 419.
36. *Id.* at 404-05.
37. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).
38. 391 U.S. 367 (1968).

position to the Vietnam War.[39] The Court found the statute at issue in the case, which forbade the mutilation of, or tampering with, official military draft cards, necessary to the government's efforts to administer the Selective Service System.[40] Thus, the Court upheld the statute as only incidentally regulating speech.[41] The Court, explaining that conduct involving speech is not always immune from prosecution, stated, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[42]

Despite the seeming inconsistency between the *O'Brien* Court's upholding of the conviction of an activist for burning a draft card in protest and the *Johnson* Court's invalidating the conviction of an activist for burning a flag in protest, the two holdings may be reconciled by reference to the government interests underlying the statutes at issue in each case. The statute in *O'Brien* was enacted to facilitate the procurement and proper identification of military personnel during war by punishing anyone "who forge[d], alter[ed], knowingly destroy[ed], knowingly mutilate[d], or in any manner change[d] any such [draft] certificate."[43] Thus, the law advanced genuine government interests through "clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of [draft] certificates."[44] The Court reasoned that the statute's nonsuppressive intent was evident in its common proscription of both expressive and nonexpressive tampering with official draft cards.[45] Further, the Court found the statute's sweep to be proper because it was limited to conduct that frustrated the government's acknowledged compelling interest in preventing draft fraud.[46] By contrast, the *Johnson* Court found the flag burning statute at issue to have been aimed at the suppression of antigovern-

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39. *Id.* at 369.

40. *See id.* at 382.

41. *See id.* at 377. At least one legal scholar has questioned the Court's claim that the law under which the defendant in *O'Brien* was prosecuted was unrelated to the suppression of expression. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-6, at 825 (2d ed. 1988) ("[T]he publicly visible evidence quite clearly shows that the amendment would not have been enacted but for the purpose of suppressing dissent.").

42. *O'Brien*, 391 U.S. at 376.

43. 50 U.S.C.S. app. § 462(b)(3) (Law. Co-op. 1988).

44. *O'Brien*, 391 U.S. at 379.

45. *See id.* at 375 (noting that the statute "does not distinguish between public and private destruction, and it does not punish any destruction engaged in for the purpose of expressing views").

46. *See id.* at 381 (finding that the statute was the only way to "assure the continuing availability of issued Selective Service certificates").

ment expression—a goal the Court found clearly to be constitutionally improper.[47]

The principle that government cannot regulate conduct in order to suppress ideological messages was recently affirmed in *R.A.V. v. City of St. Paul*.[48] Reviewing the conviction of a cross-burner pursuant to a statute criminalizing cross burning and the display of symbols known to "arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ,"[49] the Supreme Court unanimously struck down the statute, but splintered five to four over the rationale. Writing for the majority, Justice Scalia stressed that nothing in the First Amendment licenses government to selectively censor only hate messages disfavored by the state.[50] Reaffirming *Johnson*'s reasoning, he wrote:

> [N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.[51]

The concurring Justices, while agreeing that the St. Paul ordinance could not stand, rejected the majority's willingness to extend First Amendment protection to hateful conduct such as cross burning.[52] Rather, they reasoned that the statute should be struck down because, although it legitimately punished certain activity, "it also criminalizes

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47. *See* Texas v. Johnson, 491 U.S. 397, 413 (1989) (finding that Texas was improperly attempting to "foster its own view of the flag by prohibiting expressive conduct relating to it").

48. 112 S. Ct. 2538 (1992).

49. St. Paul, Minn., Code § 292.02 (1990). The statute provided in full:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.

50. *See R.A.V.*, 112 S. Ct. at 2545 ("[G]overnment may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

51. *Id.* at 2544.

52. *Id.* at 2564 (Stevens, J., concurring) ("[T]he Court today . . . applies the prohibition on content-based regulation to speech that the Court had until today considered wholly 'unprotected' by the First Amendment—namely, fighting words. This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law.").

a substantial amount of expression that—however repugnant—is shielded by the First Amendment."[53]

The essential principle of law that emerges from the *O'Brien-Johnson-R.A.V.* line of cases is that the government may not proscribe some expressive conduct and permit other, when the distinction is made on context or viewpoint. Thus, any government regulation of unspoken conduct must apply with equal force to both expressive and nonexpressive conduct. If a law purports to ban cross burning for the sake of reducing the incidence of unwanted fires, it must also ban other types of burnings that are devoid of ideological symbolism. Otherwise, government impermissibly engages in content-based regulation of expressive conduct.

The Court has affirmed content-based regulations of speech, however, when such regulations could be justified by a substantial government interest and the regulation allowed ample avenues for the expression of the regulated communication.[54] Under the "secondary effects doctrine,"[55] regulations of speech are permitted if they are limited as to the time, place, and manner in which such speech can occur.[56] Such regulations target the secondary effects of the regulated speech rather than the actual content and are therefore considered content-neutral.[57]

The third First Amendment principle that informed the *Sheldon* decision is that any regulation aimed at stifling viewpoints must be excised by the courts. As the Supreme Court has stated, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[58] As even the Justices in the *R.A.V.* minority agreed, "'viewpoint discrimination is censorship in its purest form.'"[59]

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53. *Id.* at 2559 (White, J., concurring).

54. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

55. *Id.* at 47.

56. *See id.* at 46-47.

57. *See id.* at 47. The *Renton* Court determined that a zoning ordinance that limited the permissible locations of pornographic movie houses constituted a permissible time, place, and manner regulation. *Id.* at 46. While acknowledging that the regulation treated pornographic movie houses differently from nonpornographic ones (i.e., that it was content-based), the Court nonetheless allowed the statute to stand on the ground that the regulation was aimed at curbing the deleterious secondary effects of pornography on the municipality. *Id.* at 47.

58. Texas v. Johnson, 419 U.S. 397, 414 (1989).

59. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2568 (Stevens, J., concurring) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)).

3. The Court's Reasoning.—Noting that the Supreme Court has extended First Amendment protection to a variety of expressive conduct, the *Sheldon* court began by examining whether cross burning constitutes speech for First Amendment purposes.[60] The court observed that the Supreme Court has extended speech status to conduct that is intended to convey a specific message likely to be understood by those witnessing the conduct.[61] The court also noted that cross burning is a well known symbol of the Ku Klux Klan's ideal of white supremacy.[62] Accordingly, the court concluded that cross burning is sufficiently expressive to constitute speech.[63]

The court next considered whether the First Amendment protects the racist message inherent in cross burning from regulation by Maryland's cross burning statute.[64] According to the court, the statute would offend the First Amendment if the government's purpose in its drafting was related to the suppression of the ideological message inherent in cross burning.[65] Thus, the court deemed the controlling inquiry to be whether the government's purpose in specifically singling out cross burning was to suppress disfavored speech or whether the statute was content neutral.[66]

In its assessment of the content-neutrality of Maryland's cross burning statute, the *Sheldon* court examined the legislative deliberations attendant to the statute's enactment.[67] The court observed that the deliberations focused on advancing racial harmony through the regulation of cross burning and not on the constitutionally benign purpose of reducing the incidence of arson, as was initially asserted by the State.[68] The court also observed that the cross burning statute added "little in scope to the pre-existing scheme for fire protection."[69] It stated that "the statute [did] not protect property owners . . . from unwanted fires anymore than the law already protected those groups before the statute's enactment."[70] Consequently, the court found that the General Assembly intended the statute to suppress speech rather

60. *Sheldon*, 332 Md. at 50, 629 A.2d at 756.

61. *Id.* at 51, 629 A.2d at 756.

62. *Id.*, 629 A.2d at 757.

63. *Id.*

64. *See id.* at 52-53, 629 A.2d at 757.

65. *See id.* at 56-57, 629 A.2d. at 758-59 (finding that such statutes are subject to strict judicial scrutiny and that they rarely withstand such scrutiny).

66. *Id.* at 53-55, 629 A.2d 758-59.

67. *Id.* at 56-57, 629 A.2d at 759-60.

68. *Id.* at 57, 629 A.2d at 760.

69. *Id.* at 56, 629 A.2d at 759.

70. *Id.*

than prevent fires.[71] Based on this determination, the court held the statute to constitute a content-based regulation of speech.[72]

Next, in accordance with *R.A.V.*'s prohibition of regulations of expressive conduct based on content or viewpoint,[73] the court explained that content-based regulations of speech are presumed to violate the First Amendment, with few and narrow exceptions.[74] The first such exception applies "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[75] Citing *R.A.V.*, the court explained that the state may constitutionally forbid the most "lascivious forms of obscenity . . . because lasciviousness is the very reason obscenity is proscribable in the first place."[76] That is, content discrimination may permissibly single out speech presenting a heightened version of the harm that is the basis for the category of proscribable speech. The court did not apply this exception to the cross burning statute, however, reasoning that if the state maintained that it was proscribing the most inciteful of constitutionally proscribable "fighting words," it would be "committing the . . . mistake . . . [of] selecting only certain socially charged words for prosecution."[77]

The second exception, which the State urged the court to apply, applies to statutes whose purpose is not to suppress speech but to curtail its secondary effects.[78] By aiming only at the "'secondary effects' of the targeted speech," this type of regulation can be "'*justified* without reference to the content of the regulated speech.'"[79] The court rejected the State's argument that the cross burning statute was aimed at reducing the secondary effects, or the fire hazards, associated with the burning of religious symbols, however.[80] Supporting its determination that the statute was enacted for the purpose of suppressing the disfavored message inherent in cross burning, the court again cited

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71. *Id.* at 57, 629 A.2d at 760.

72. *Id.*

73. *See supra* text accompanying note 51.

74. *Sheldon*, 332 Md. at 58, 629 A.2d at 760; *see* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545 (1992) ("[The prohibition against content discrimination] applies differently in the context of proscribable speech than in the area of fully protected speech.").

75. *R.A.V.*, 112 S. Ct. at 2545. Proscribable categories of speech include obscenity, defamation, and fighting words. *Sheldon*, 322 Md. at 58, 629 A.2d at 760.

76. *Sheldon*, 332 Md. at 58, 629 A.2d at 760.

77. *Id.* at 60, 629 A.2d at 761; *see R.A.V.*, 112 S. Ct. at 2547 (stating that the state may not proscribe a subset of totally proscribable speech for a reason related to the "official suppression of ideas").

78. *Sheldon*, 332 Md. at 60, 629 A.2d at 761.

79. *Id.* at 58, 629 A.2d at 760 (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

80. *Id.* at 60, 629 A.2d at 761.

the statute's legislative history and its negligible contribution to existing arson laws.[81]

The State also urged the application of R.A.V.'s third exception to the presumption against the constitutionality of content-based regulations of speech on the ground that Maryland's cross burning statute involved no official suppression of ideas.[82] The third exception applies when the speech at issue is within the few, entirely proscribable categories of speech, such as fighting words, obscenity, and defamation.[83] With respect to these narrow categories, the state may regulate speech on the basis of content if there is no "realistic possibility that suppression of ideas is afoot."[84] For example, a state could proscribe obscene movies featuring blue-eyed participants, since obscenity is proscribable and the selective "blue-eyed" proscription is unrelated to the suppression of ideas.[85] Stressing that this exception applies only when entirely proscribable speech is at issue, the court rejected the State's plea on the ground that the State had failed to make the argument that cross burning constitutes entirely proscribable speech,[86] *e.g.*, fighting words.

Having ruled out the possibility that any of *R.A.V.*'s three exceptions to the constitutional presumption against content-based statutes applied to Maryland's cross burning statute, the court proceeded to subject the statute to strict scrutiny.[87] Under strict scrutiny, a state must show that its regulation is "necessary to serve a compelling state interest and [that it is] narrowly drawn to achieve that end."[88] Applying the first prong of the test, the *Sheldon* court acknowledged that the State's asserted interest in protecting society from bias-motivated threats was compelling.[89] The court concluded, however, that the statute did not satisfy the second prong because "it [could not] be

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81. *Id.* The court further noted that few fires are known to be the result of burning crosses. *Id.* at 61, 629 A.2d at 762.

82. *Sheldon*, 332 Md. at 61, 629 A.2d at 762.

83. *See id.* Initially formulated in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the fighting words doctrine holds that there is no First Amendment protection for words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The viability of the doctrine, however, is uncertain, as it has never been re-affirmed by the Court. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (remaining silent as to whether the fighting words doctrine remains an exception to the prohibition on the regulation of speech).

84. *Sheldon*, 332 Md. at 59, 629 A.2d at 761 (quoting *R.A.V.*, 112 S. Ct. at 2547).

85. *See R.A.V.*, 112 S. Ct. at 2547.

86. *Id.*

87. *Id.* at 62, 629 A.2d at 762.

88. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

89. *Sheldon*, 332 Md. at 62-63, 629 A.2d at 762-63 (noting the State's interest in "promot[ing] social harmony").

deemed necessary to the state's effort to foster racial and religious accord."[90] Consequently, the court pronounced the statute unconstitutional.[91]

4. Analysis.—

a. Cross Burning: Constitutional Expression or Fighting Words?—Although the State never claimed that cross burning constitutes unprotected speech *(i.e.,* fighting words), it nonetheless attempted to invoke *R.A.V.*'s secondary effects exception, which applies only to content-based and suppressive regulations of *unprotected speech.*[92] In advancing the internally inconsistent argument that the statute was both content-neutral and subject to the secondary effects doctrine,[93] the State revealed its misunderstanding of First Amendment jurisprudence, its anxiety to avert the fate met by the City in *R.A.V.*, and implicitly, its view that the statute was, in fact, suppressive. If the State had defended the statute more arduously as a fire prevention measure and not conceded its intent to suppress,[94] the court might have applied a standard less stringent than the strict scrutiny test.[95] Like other statutes that have withstood constitutional chal-

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90. *Id.* at 63, 629 A.2d at 763 (emphasis added). The court stated that "the Constitution does not allow the unnecessary trammeling of free expression even for the noblest of purposes." *Id.*

91. *Id.*

92. *Id.* at 60, 629 A.2d at 761.

93. *See supra* notes 54-57 and accompanying text (discussing the secondary effects doctrine).

94. *See Sheldon,* 332 Md. at 62, 629 A.2d at 762; *see also* Brief of Appellant at 12 (stating that the State did not dispute that the statute regulated expressive speech or that the statute discriminated between expressive speech on the basis of its content).

95. The court could have applied one of two less strenuous standards. The more lenient of the two was set forth in United States v. O'Brien, 391 U.S. 367 (1968), and applies to statutes that are unrelated to the suppression of expression. Under this low level of scrutiny, the regulation must be within the constitutional power of the state, the government interest furthered by the regulation must be substantial, and the incidental restriction on speech must not be greater than necessary. *Id.* at 377. To apply this test, the *Sheldon* court could have construed the cross burning statute simply as regulating fire hazards, an area of acknowledged government interest unrelated to the suppression of speech.

A more plausible alternative standard that the *Sheldon* court might have applied was set forth in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). The *Renton* test applies to statutes that are suppressive but content-neutral and requires that they be justifiable without reference to the content of the regulated speech. *Id.* at 48. That is, their existence must be justified by noncensorial purposes. *Id.* As the *Sheldon* court noted, such regulations "typically seek[ ] only to subject the speaker to . . . 'reasonable time, place, or manner restrictions.'. . . [T]ime, place, and manner restrictions are valid if 'they are narrowly tailored to serve a significant government interest, and [if] they leave open ample alternative channels for communication of the information.'" *Sheldon,* 332 Md. at 54, 629 A.2d at 758 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293

lenges, Maryland's cross burning statute, by merely requiring that the local fire department be notified and that cross burnings not be trespassory, limited its regulation of cross burnings to "manner" and "place."[96] Under Maryland's statute, cross burnings legally could take place in a variety of settings, provided that cross burners complied with the law's modest restrictions. As such, the Maryland statute avoided the type of wholesale proscription of cross burning that was adjudged overbroad in *R.A.V.*[97] Thus, *as written*, the statute did not directly regulate the speech element of cross burning; its sweep was tailored strictly to the act itself.

Because the State instead argued that the statute fit into one of the three exceptions allowing regulation of unprotected speech, the *Sheldon* court took the opportunity to look closely at the standards announced in *R.A.V.*, and in so doing, determined that the statute was a "means of obstructing the message inherent in cross burning."[98] The court's determination that the statute was content-based was inevitable, given the substantial legislative record evincing its suppressive purpose.[99] Moreover, it is plain that the legislature would not have enacted a fire prevention law covering only cross burnings if not for a strong objection to the message inherent in cross burnings. As the *Sheldon* court observed, few destructive fires are the result of cross burnings.[100]

It is peculiar, however, that the court chose even to discuss the inapposite *R.A.V.* framework and to justify its holding largely in terms of *R.A.V.*'s inapplicable guidelines.[101] One can only surmise that the

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(1984)). "Narrowly tailored," however, does not "mean that [the regulations] need be the least restrictive or least intrusive means of serving the government's interests." *Id.* Thus, the court could have found that, although the Maryland legislature opted for a rather intrusive means of asserting its authority in the sphere of fire prevention, the statute did not eliminate all opportunities for cross burners to manifest their bigotry. As such, the statute would seem to satisfy the requirements of *Renton*.

96. *See Renton*, 475 U.S. at 49.

97. *See supra* notes 48-53 and accompanying text.

98. *Sheldon*, 332 Md. at 57, 629 A.2d at 760.

99. *See supra* text accompanying note 68.

100. *Sheldon*, 332 Md. at 61, 629 A.2d at 762.

101. The court's apparent confusion over the applicability of *R.A.V.*'s three exceptions to content-based regulations of unprotected speech seems to have resulted from a misinterpretation of the following passage from the *R.A.V.* majority opinion: "The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier, *nor within a more general exception for content discrimination that does not threaten censorship of ideas.*" R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548 (1992) (emphasis added). This statement should be considered in conjunction with the majority's earlier statement that "to validate such selectivity (*where totally proscribable speech is at issue*) it may not even be necessary to identify any particular 'neutral' basis, *so long as the nature of the content discrimination is such that there*

court felt obliged to pay heed to *R.A.V.* because the State made it an issue.

b. The Unavailingness of the Secondary Effects Doctrine.—In rejecting the State's argument for the application of the secondary effects doctrine,[102] the *Sheldon* court again stressed its rationale for finding the statute content-based—the clearly suppressive intent of the legislature and the statute's telling duplication of Maryland's already substantial scheme of laws against arson and trespass.[103] The court also distinguished the Maryland statute from the statute in *Renton*, which, despite its different treatment of pornographic and nonpornographic movie houses, was upheld by the Supreme Court on the ground that the legislature that drafted it had "content-neutral" intentions.[104] In *Renton*, the focus of Washington State's legislature was on sparing the community from the deleterious effects known to result from pornographic movie houses, such as lower property values and contractionary effects on the local economy.[105] The *Renton* Court therefore concluded that the purpose of the Renton ordinance was not to censor pornographic films, but to curtail their potential harmful effects on the locality.[106] The Court stressed that pornographic movie houses could still operate, but only outside the main community.[107]

Drawing from *Renton*, the *Sheldon* court could have construed the Maryland statute as a zoning mechanism whereby cross burnings were restricted for reasons other than their inherent speech element, *i.e.*, fire safety. This approach would have required the court to ignore the legislature's clearly suppressive motivation in enacting the statute and also to forsake precedent; the *R.A.V.* Court forbade *any* selective regu-

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is no realistic possibility that official suppression of ideas is afoot." Id. at 2547 (emphasis added). Since the State in *Sheldon* never claimed, let alone established, that the racist speech inherent in cross burning was totally proscribable speech, and since the Maryland statute's legislative history clearly evidenced its suppressiveness, *R.A.V.*'s exceptions were unavailing to the State.

102. The State's argument was inconsistent with its hypothesis as to the motivation of the statute. The State maintained that the statute was content-neutral in urging the application of the secondary effects doctrine, which applies only to suppressive *and* content-based regulations of speech. *See* Brief of Appellant at 20-21.

103. *Sheldon*, 332 Md. at 60, 629 A.2d at 761.

104. *See id.* at 61, 629 A.2d at 762 ("The uniqueness of adult theatres, in the Court's view, justified the selective treatment of them.").

105. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986) ("[T]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects.").

106. *Id.* at 48.

107. *See id.* at 53 (finding that an area of 520 acres remained open to such theaters).

lation of conduct on account of its inherent speech element.[108] In the wake of *R.A.V.*, legislatures cannot regulate even a sub-group of an area of legitimate government interest, such as fire safety, if the purpose motivating the regulation is to suppress ideological messages. Thus, the *Sheldon* court was obliged to examine the legislative record to ascertain the intent of the statute and to excise any impermissible bias it discovered in the regulation.

In at least one important respect, however, Maryland's regulation, more clearly than the statute in *Renton*, could have been justified without reference to the speech element inherent in cross burning. It is well acknowledged that government has a right—and perhaps a duty—to regulate fire hazards.[109] Until *Renton*, no right had been recognized for governments to fashion zoning guidelines on the basis of the speech content of movie houses. Since fire hazards are legitimately regulable and since the statute did not ban cross burnings altogether, the statute *could* have been justified without reference to the speech element inherent in cross burning. Thus, the court might have analyzed it as a form of time, place, and manner regulation. The Court of Appeals, however, looked beyond the statute's ostensibly neutral construction and determined that a desire to suppress disfavored speech was the actual motivation for its enactment.

5. Conclusion.—The *Sheldon* court's essential holding—that regulations of expressive conduct motivated by a desire to squelch disfavored messages offend the First Amendment—is consistent with the Supreme Court's jurisprudence on the First Amendment. Any regulation of expressive conduct must be justified by a substantial governmental interest or, when entirely proscribable speech is at issue, must be aimed strictly at curtailing the secondary effects associated with such speech. In either case, regulations of conduct must be unrelated to the suppression of ideas.

The Maryland statute ultimately failed constitutional muster because, in specifically singling out cross burnings instead of a larger subset of fire hazards, the statute's sweep had no legitimate relationship to the asserted government interest. Thus, the statute was underinclusive: it was tailored strictly to the disfavored expressive conduct, not to other types of outdoor burnings whose regulation might have

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108. *See supra* text accompanying note 51.

109. *See generally Sheldon*, 332 Md. at 54-55, 629 A.2d at 759 (discussing the State's original contention that it enacted the cross burning statute to protect its citizens from the hazards of unwanted fires).

been justified by safety considerations and without reference to speech.

FERNANDO I. RUIZ

IV. CONTRACTS

A. *The Exercise of Bad Faith in a Land Sale Contract*

In *Leet v. Totah*,[1] the Court of Appeals upheld the validity of a remedies limitation clause in a private real estate contract despite evidence of bad faith.[2] Finding for the vendor, the court ruled that his attempt to extract a purchase price far in excess of the contract price, his subsequent conveyance of the property to his children, and his persistence in default resulting in the expiration of the vendee loan commitment did not negate the remedies limitation clause.[3] The court considered none of these actions sufficiently unconscionable or contrary to public policy to warrant judicial intervention into the parties' private agreement.[4] Although the court's decision was well grounded in the case law and meant to reinforce the power of private parties to fashion legally enforceable agreements, the court's permissive stance in the face of clear evidence of bad faith may undermine its intentions by generating a reluctance to enter into private agreements.

1. The Case.—On December 28, 1984, vendor Harry M. Leet and purchaser Sami Totah, a real estate developer, entered into a contract for the purchase and sale of approximately 417 acres of farmland in Montgomery County.[5] Totah paid a deposit of $100,000.[6]

The December 1984 contract contained several important provisions. First, it required Totah to formulate a plan of development for the property subject to approval by public authorities.[7] Second, while the final contract price would depend on the number of lots actually approved, the parties established a minimum purchase price of $14 million.[8] This figure was based on the projected approval of approximately 1500 lots under the then applicable zoning status at the property.[9] Third, Totah was given four years from December 31, 1984,

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1. 329 Md. 645, 620 A.2d 1372 (1993).
2. *See id.* at 666, 620 A.2d at 1382.
3. *See id.* at 660-62, 620 A.2d at 1379-80.
4. *See id.*
5. *Id.* at 648-49, 620 A.2d at 1373.
6. *Id.* at 649, 620 A.2d at 1373.
7. *Id.*, 620 A.2d at 1374.
8. *See id.* at 650, 620 A.2d at 1374.
9. *Id.* During the period of the contract, the zoning status of the property was R-200. The Maryland-National Capital Park and Planning Commission, however, was developing recommendations for a new master plan for the Germantown area of Montgomery County.

extendable at the vendor's option, to obtain all the necessary approvals for development, and up to nine years from the date of settlement of the first approved lots to settle on the entire property.[10] Finally, a preliminary plan was to be submitted to the public authorities within 180 days from the contract date.[11]

The December 1984 contract contained two clauses that played a direct role in the instant case. Under the conditions of the title warranty clause, Leet agreed to take no further actions which would affect the title to the property in any way.[12] The contract also contained a remedies limitation clause designed to govern possible defaults.[13] It provided that if Totah breached the contract, Leet would return the balance of the deposit plus interest and the contract would terminate.[14] Likewise, if Leet were to default in any way including a failure to settle, Totah had the option of either (1) collecting his deposit plus

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Id. at 651, 620 A.2d at 1375. Under its final draft, issued in September 1988, the Commission recommended a continuation of the R-200 zoning on the property, but further recommended that the property be developed as a planned development floating zone, or PD-2. *Id.* at 652, 620 A.2d at 1375. The master plan was approved by the Montgomery County Council, sitting as the District Council, in June 1989. *Id.* at 652-53, 620 A.2d at 1375. Totah, in fact, applied for a PD-2 zoning reclassification in August 1989. *Id.* After filing suit in December 1989, Totah continued to work towards rezoning the property. *Id.* at 654 n.5, 620 A.2d at 1376 n.5. His request was finally approved by the Montgomery County Council, sitting as District Council, on September 25, 1990. *Id.*

10. *See id.* at 649, 620 A.2d at 1374.

11. *Id.*

12. *See id.* at 650, 620 A.2d at 1374. As quoted by the court, the provisions of the title warranty clause were as follows:

> [T]he Seller and Agent are hereby expressly released from all liability for damages by reason of any defect in the title, except due to act or omission of Seller subsequent to date of this Contract. From the date of acceptance of the conditions of the contract by Purchaser, Seller shall take no action . . . which will result in any additional change to the Title or any additional encumbrance, easement, restriction, covenant, or condition on the property without the prior written consent of Purchaser.

Id.

13. *See id.* at 650-51, 620 A.2d at 1374. As quoted by the court, the provisions of the remedies limitation clause were as follows:

> If Purchaser shall default under this Contract of Sale, the balance of the Good Faith Deposit and accrued interest thereon, shall be paid to Seller, . . . this Contract of Sale shall terminate and the parties hereto shall be released from further liability or obligation to the other.
>
> If Seller shall default under this Contract of Sale, including failure to make full settlement pursuant to the terms hereof, Purchaser, at its option, may (i) direct that the balance of the deposit with interest thereon be paid to Purchaser, the Contract terminated and each party relieved of further liability or obligation to the other, or (ii) seek relief in the courts to require specific performance. Seller shall not be liable for money damages for any default hereunder.

Id.

14. *Id.*

interest and terminating the contract, or (2) seeking specific performance through the courts.[15] The remedies limitation clause specifically provided that Leet "shall not be liable for money damages for any default hereunder."[16]

On April 17, 1985, a month and a half before the deadline for the preliminary plan, Leet and Totah met and agreed that the maximum yield from the property would be far less than the 1500 lots originally considered.[17] At this point, they made several changes to the contract, including reducing the projected lot yield to 1024 lots.[18] Accordingly, the parties reduced the minimum purchase price to $10 million.[19] They also extended the deadline for obtaining all approvals by one year,[20] and Totah paid $50,000 in cash to obtain an option to extend the deadline an additional year.[21] Finally, the parties agreed to extend the date for submission of the preliminary plan to December 31, 1987.[22]

Meanwhile, after Totah had completed a title examination and while the contract was still in effect, Leet negotiated two separate conveyances of interests in the property to his children.[23] He conveyed the interests as gifts to maximize his annual gift tax exclusion as part of his estate planning.[24] Leet testified that in making the gifts, he "simply forgot" his contractual obligations under the title warranty clause.[25]

In mid-December 1987, the Maryland-National Capital Park and Planning Commission still had not issued its master zoning plan for the property. This plan would have a direct affect on Totah's development scheme for the property.[26] Aware of the impending deadline for submission of the preliminary plan, Totah wrote Leet requesting an extension.[27] Leet responded that he would grant Totah's request in exchange for certain changes in the contract, including an increase

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15. *Id.*
16. *Id.* at 651, 620 A.2d at 1374.
17. *See id.*, 620 A.2d at 1375.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *See id.* at 654, 620 A.2d at 1376. The two deeds were conveyed on December 31, 1986, and January 14, 1987. *Id.* These conveyances later formed the basis for one of Totah's claims for damages. *See infra* text accompanying notes 86-90.
24. *Leet*, 329 Md. at 654, 620 A.2d at 1376.
25. *Id.*
26. *See id.* at 652, 620 A.2d at 1375; *see also supra* note 9.
27. *Leet*, 329 Md. at 652, 620 A.2d at 1375.

in the minimum purchase price to $16 million.[28] Refusing to accept this offer, Totah was forced to prepare the plan in an expeditious manner, but nonetheless succeeded in submitting the plan before the deadline.[29]

Two years later, on December 8, 1989, Totah exercised his option to extend the deadline for approvals until December 31, 1990.[30] Then, on December 19, 1989, Totah wrote to Leet calling for settlement on the entire property to be held on December 27, 1989.[31] Totah anticipated paying the minimum purchase price of $10 million.[32] In a reply through counsel, Leet alleged that Totah had failed to satisfy several conditions of the contract.[33] He threatened to cancel the contract unless Totah agreed to adjust the price equitably.[34] When Leet failed to appear at settlement, Totah filed suit in the Circuit Court for Montgomery County.[35]

Count I of Totah's complaint alleged that Leet breached the contract when he failed to convey the property after Totah had called for settlement.[36] Totah requested relief in the form of $100 million in damages and specific performance from Leet and his children.[37] In Count II of the complaint, Totah alleged breach of the title warranty clause by virtue of Leet's conveyances to his children and requested damages and specific performance from Leet alone.[38]

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28. *Id.* This request later formed the basis of one of Totah's claims of unconscionability and bad faith. *See infra* text accompanying notes 91-101, 115.

29. *Leet*, 329 Md. at 652, 620 A.2d at 1375.

30. *See id.* at 653, 620 A.2d at 1375. This extension was made while Totah was still awaiting a ruling on his application for rezoning. *See supra* note 9.

31. *Leet*, 329 Md. at 653, 620 A.2d at 1375.

32. *Id.* Totah enclosed calculations with his letter attempting to demonstrate that the maximum number of living units, whether under the applicable R-200 zoning or under the proposed PD-2 zoning, would produce a purchase price, after cost of living adjustments, below the $10 million purchase price. *Id.*, 620 A.2d at 1375-76.

33. *See id.*, 620 A.2d at 1376.

34. *See id.* The reply letter stated, "Mr. and Mrs. Leet hereby cancel the contract unless you notify us forthwith that you will agree to adjust the price equitably." *Id.*

35. *See id.* at 654, 620 A.2d at 1376.

36. *See id.* at 655, 620 A.2d at 1376.

37. *See id.* Totah's complaint contained seven counts. Count III, alleging intentional interference with contractual relations, was determined in favor of Leet on motion for judgment at the close of the case. Count IV, alleging fraudulent misrepresentation by the Leets, was similarly disposed of. Neither of these judgments were cross-appealed by Totah. Count V, based on quantum meruit, and Count VI, based on unjust enrichment, were claimed against the Leets and not their children. Count VII, based on promissory estoppel, claimed damages against the Leets and specific performance against the Leets and their children. *Id.* at 655 n.6, 620 A.2d at 1376 n.6.

38. *See id.*

At a hearing on pretrial motions, Totah urged that a pretrial ruling on the applicability of the remedies limitation clause was "essential" in order to ascertain the feasibility of a damage argument.[39] The court accepted his argument and held that "the damage waiver does not apply . . . [t]o any count."[40] Relying on this ruling as an endorsement of his strategy to seek damages, Totah withdrew his prayer for specific performance.[41]

At trial, Totah sought to prevent Leet from mentioning the remedies limitation clause in his opening statement.[42] The judge allowed Leet to argue the clause's effect, though he reiterated his commitment to instructing the jurors about the invalidity and inapplicability of the clause to the case.[43] At the conclusion of Leet's opening statement, Totah objected to Leet's reference to the remedies limitation clause and requested an immediate instruction to the jury that the clause had been ruled inapplicable.[44] After hearing arguments on both sides, the judge instructed the jury that "the provision . . . stating that the seller shall not be liable for money damages for any default hereunder was void as a matter of law" and that they should "not consider that as a part of the contract."[45] The judge gave a similar instruction at the conclusion of the evidence.[46] Subsequently, the jury returned a verdict on Count I in favor of Totah for $15 million.[47] This figure represented the market value of the property at the time of settlement, less the contract price.[48] Because the jury found that the damages under Count I fully compensated Totah, it did not return a verdict on Count II.[49]

The Court of Appeals granted certiorari.[50]

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39. *Id.*, 620 A.2d at 1377. Totah argued that "if I know that I am faced with a contract that gives me no damages whatsoever under the circumstances of this case, I ought to know that at the beginning of trial, not the end." *Id.*

40. *See id.* at 655-56, 620 A.2d at 1377.

41. *See id.* at 656 n.7, 620 A.2d at 1377 n.7.

42. *See id.* Totah requested "that [defense counsel] be precluded during opening argument to the jury from describing this 'you can't get any damages' clause and starting to get the jury confused about something that you have already ruled on." *Id.*

43. *See id.*

44. *Id.* at 657, 620 A.2d at 1377. The objectionable reference in the opening statement was Leet's statement that "the key to getting the right answer in this case [is to] find it in the contract." *Id.*

45. *Id.*, 620 A.2d at 1378.

46. *See id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 645, 620 A.2d at 1372.

2. Legal Background.—Traditionally, courts have recognized a strong public interest in permitting private individuals to structure legally enforceable agreements unhindered by a court of law.[51] Consequently, contractual clauses denying liability or limiting remedies generally have been upheld by the Maryland judiciary.[52] As the Court of Special Appeals stated in *Schrier v. Beltway Alarm Co.*,[53] "some courts have designated contract provisions [denying liability] as exculpatory, others as a limitation of liability, and still others label it as a liquidated damages clause. Regardless of the nomenclature, courts have uniformly upheld these contract clauses."[54]

While the law treats contractual provisions denying or limiting remedies in essentially the same manner, there is a conceptual difference between the two. Clauses denying liability, or exculpatory clauses, generally relieve a party of liability for negligence.[55] While generally upheld, these clauses will not insulate a party from liability for the more extreme forms of negligence or intentional conduct.[56] On the other hand, remedy limitation clauses explicitly define or limit the remedy that can be sought for breach of contract.[57] In particular,

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51. *See* Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 606, 386 A.2d 1216, 1228-29 (1978) ("This reluctance on the part of the judiciary to nullify contractual agreements . . . also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle."). Rather than risk frustrating the parties' intent through judicial interference, the courts have preferred to defer to the legislature. *See* United States v. Moorman, 338 U.S. 457, 462 (1950) ("Nor should such an agreement of parties be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for the settlement of disputes, this deprivation should come from the legislative branch.").

52. *See, e.g., Maryland-Nat'l*, 282 Md. 588, 386 A.2d 1216 (1978); Schrier v. Beltway Alarm Co., 73 Md. App. 281, 533 A.2d 1316 (1987); Boucher v. Riner, 68 Md. App. 539, 514 A.2d 485 (1986); Winterstein v. Wilcom, 16 Md. App. 130, 293 A.2d 821 (1972).

53. 73 Md. App. 281, 533 A.2d 1316 (1987).

54. *Id.* at 287, 533 A.2d at 1319.

55. *See Boucher*, 68 Md. App. at 539, 514 A.2d at 485 (upholding an exculpatory provision relieving parachuting school from liability from negligence); *Winterstein*, 16 Md. App. at 143, 293 A.2d at 828 (upholding an exculpatory provision relieving negligence liability in the drag racing business).

56. *See Boucher*, 68 Md. App. at 543, 514 A.2d at 488 ("A waiver of a right to sue . . . is ineffective to shift the risk of a party's own wilful, wanton, reckless, or gross conduct."); *Winterstein*, 16 Md. App. at 136, 293 A.2d at 824-25 ("[E]xculpatory agreements otherwise valid are not construed to cover the more extreme forms of negligence—wilful, wanton, reckless or gross. Nor do they encompass any conduct which constitutes an intentional tort.").

57. *See* United States v. Moorman, 388 U.S. 457, 463 (1950) (upholding a noncontestability provision); Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 615, 386 A.2d 1216, 1224 (1978) (upholding a contractual provision stipulating extrajudicial modes of dispute resolution); *Schrier*, 73 Md. App. at 299, 533 A.2d

these clauses are upheld in circumstances in which damage calculations are difficult, as long as the provision does not act as a penalty for breach.[58]

While courts generally enforce both exculpatory clauses and remedy limitation clauses, there are several circumstances in which they have refused to do so. First, courts have refused to uphold provisions that are deemed to run contrary to public policy.[59] Maryland courts have long accepted that "considerations of public policy are deemed paramount to private rights and where conflict between the two exists, private interests must yield to the public good."[60] Unfortunately, the term public policy has defied concise definition.[61] The Court of Appeals has declared that "[n]o exact definition of public policy has ever been given or can be found . . . . [P]ublic policy . . . at best is but a shifting and variable notion appealed to only when no other argument is available, and which, if relied on today, may be utterly repudiated tomorrow."[62]

Because of the nebulous nature of the public policy concept, courts have been hesitant to use it as the basis for invalidating contractual provisions.[63] In *Winterstein v. Wilcom*,[64] the Court of Special Appeals held that "[i]n the absence of legislation to the contrary, the law, by the great weight of authority, is that there is ordinarily no public policy which prevents the parties from contracting as they see fit

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at 1324 (upholding a liquidated damage clause stipulating the damages that could be recovered).

58. *See Schrier*, 73 Md. App. at 291, 533 A.2d at 1320-21 (recognizing the difficulties of calculating damages in the context of burglar alarm contracts).

59. *See Maryland-Nat'l*, 282 Md. at 605, 386 A.2d at 1228.

60. *Id.*

61. In *Maryland-National*, the Court of Appeals quoted what it considered to be "the classical formulation of the public policy doctrine—that to which we adhere in Maryland":

> Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

Id. (quoting Egerton v. Earl Brownlow, 4 H.L. Cas. 1, 196 (1853)). The court in *Maryland-National* later conceded that this definition was a "relatively indeterminate description." *Id.*

62. Kenneweg v. Allegany County Comm'rs, 102 Md. 119, 125, 62 A. 249, 251 (1905).

63. *See Maryland-Nat'l*, 282 Md. at 606, 386 A.2d at 1228.

> Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where 'the common sense of the entire community would . . . pronounce it' invalid.

Id. (citation omitted).

64. 16 Md. App. 130, 293 A.2d 821 (1972).

. . . ."[65] Thus, legislation can offer a concrete formulation of public policy.[66] When the legislature has explicitly prohibited a contractual clause, usually in response to a judicial decision upholding such a provision, the courts are willing to nullify contracts on public policy grounds.[67] In the end, what is required is a judicial balancing of public and private interests, bearing in mind the law's traditional protection of private expectations and its disdain of unjust enrichment.[68]

While courts are disinclined to annul a private agreement on public policy grounds, there are exceptions to this general rule.[69] One widely recognized exception is the bargaining disadvantage exception.[70] The *Winterstein* court held that "[w]hen one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the [other] . . . , the agreement is void as against public policy."[71] In determining if a bargaining disadvantage exists, courts examine the situation surrounding formation of the contract for factors such as coercion and business experience.[72]

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65. *Id.* at 135, 293 A.2d at 824. The only state in which an exculpatory clause has been found invalid on public policy grounds is New Hampshire. *See* Eastern Ave. Corp. v. Hughes, 228 Md. 477, 480, 180 A.2d 486, 488 (1962) (commenting on the weight given public policy considerations in New Hampshire).

66. *See also* United States v. Moorman, 338 U.S. 457 (1950).

67. *See* Winterstein v. Wilcom, 16 Md. App. 130, 134-35, 293 A.2d 821, 824 (1972) ("[I]n some states, subsequent to a judicial decision upholding such claims, the legislature had enacted statutes invalidating some types of exculpatory clauses . . . . In the absence of legislation to the contrary, the law, by the great weight of authority, is that there is ordinarily no public policy which prevents the parties from contracting as they see fit . . . ."). In Maryland, landlord and tenant agreements are the only realm in which the legislature has expressly prohibited any form of exculpatory clauses. *See id.* at 135, 293 A.2d at 824; *see also* MD. ANN. CODE art. 53, § 40 (1992).

68. *See* Maryland-Nat'l Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 607, 386 A.2d 1216, 1229 (1978). In *Maryland-National*, the Court of Appeals noted four factors to be considered in a court's balancing of public and private interests.

> Factors weighing against enforcement of a contractual term for reasons of public policy include: a) the strength of that policy as manifested by legislation and judicial decisions; b) the likelihood that a refusal to enforce the term will further that policy; c) the seriousness of any misconduct involved and the extent to which it was deliberate; d) the directness of the connection between that misconduct and the challenged term.

Id. at 607 n.8, 386 A.2d at 1229 n.8.

69. *See* Boucher v. Riner, 68 Md. App. 539, 548-49, 514 A.2d 485, 490 (1986).

70. *See Winterstein*, 16 Md. App. at 135-36, 293 A.2d at 824.

71. *Id.*

72. Bargaining disadvantage is to be assessed at the time of contract formation. *See Boucher*, 68 Md. App. at 548-49, 514 A.2d at 490 ("[S]uch an agreement will be invalid if the relationship of the parties is such that one party is at an obvious disadvantage in bargaining at the time the contract is entered so that the effect of the contract is to put him at the mercy of the other's negligence."); *see also* Flow Indus., Inc. v. Fields Constr. Co., 683 F. Supp. 527, 531 (D. Md. 1988) (holding that the difference in the sizes of two companies does not alone suggest a bargaining disadvantage); Schrier v. Beltway Alarm Co., 73 Md.

A second exception to the court's reluctance to invalidate contract clauses on public policy grounds involves transactions affected with the public interest.[73] Such transactions typically exhibit one or more characteristics of a six factor test that Maryland courts have adopted.[74] The six characteristics are: (1) the type of business generally is thought suitable for public regulation; (2) the party seeking relief from liability is performing a service of great importance to the public, often a matter of necessity to some members of the public; (3) the party presents himself as willing to perform the service for any member of the public, or at least those members meeting certain established criteria; (4) the party seeking relief from liability possesses a decisive bargaining advantage due to the essential nature of its service and due to the economic setting; (5) through an exercise of superior bargaining power, the party presents the public with a standardized contract of adhesion and makes no provision whereby a purchaser may obtain protection against negligence; and (6) as a result of the transaction, the person or property of the buyer is placed under the seller's control and subjected to the risk and carelessness of the seller.[75] Maryland courts have held burglar alarm contracts, parachuting contracts, and drag racing contracts to be contracts not affected with a public interest.[76]

The second circumstance under which courts are willing to annul exculpatory and remedies limitation clauses involves a finding of unconscionability.[77] Section 2-302 of the Commercial Law Article states

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App. 281, 297, 533 A.2d 1316, 1324 (1987) (finding no bargaining disadvantage in the relationship between an alarm company and its client); *Winterstein*, 16 Md. App. at 130, 293 A.2d at 821 (upholding an exculpatory agreement in a drag racing speedway contract).

In assessing bargaining disadvantage, courts look for evidence of some type of compulsion. *See Boucher*, 68 Md. App. at 550, 514 A.2d at 491 ("Boucher was under no compulsion to make a parachute jump, and he did so merely because he wanted to do so. He was not at a bargaining disadvantage."); *Winterstein*, 16 Md. App. at 138, 293 A.2d at 825 ("Winterstein was under no compulsion, economic or otherwise, to race his car.").

73. In *Winterstein*, the Court of Special Appeals cited public utilities, common carriers, innkeepers, and public warehousemen as examples of businesses affected with the public interest. *See Winterstein*, 16 Md. App. at 136, 293 A.2d at 824.

74. The Court of Special Appeals adopted the six part test in *Winterstein* from a leading decision of the Supreme Court of California. See id. at 136-37, 293 A.2d at 825 (citing Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445-46 (Cal. 1963)).

75. *Id.*

76. *See Schrier*, 73 Md. App. at 296-97, 533 A.2d at 1323; *Boucher*, 68 Md. App. at 551, 514 A.2d at 491; *Winterstein*, 16 Md. App. at 138, 293 A.2d at 825-26.

77. *See* Wilson Trading Corp. v. David Ferguson, Ltd., 244 N.E.2d 685, 687 (N.Y. 1968) ("[C]ontractual limitations upon remedies are generally to be enforced unless unconscionable."); *Schrier*, 73 Md. App. 281, 533 A.2d 1316 (refusing to find that an exculpatory clause in a burglar alarm contract was unconscionable).

the Maryland policy of unconscionability.[78] The first official comment to section 2-302 explains that

> [t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.[79]

Thus, in assessing unconscionability, courts generally look for evidence of business experience and evidence of bargaining disadvantage at the time of contract formation.

A third legal doctrine that can operate to invalidate exculpatory and remedies limitation clauses is bad faith. Maryland courts have made it clear that bad faith can encompass a wide variety of conduct under a contract.[80] "[B]ad faith is not limited to 'malice, fraud or the like.'"[81] In business transactions, Maryland courts have held "good faith to be that ordinarily exhibited by a seller who is unable to perform through no fault or fraud of his own, while bad faith is that shown by a seller who refuses to perform when able to do so."[82] In fact, in cases involving a fiduciary duty, Maryland courts have held that bad faith acts as a bar to enforcement of an exculpatory provision.[83]

3. The Court's Reasoning.—Reversing the decision of the circuit court, the Court of Appeals held in *Leet* that the remedies limitation

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78. MD. CODE ANN., COM. LAW I § 2-302 (1992). The section reads in full:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Id.

79. *Id.* at cmt. 1.8.

80. *See* Hupp v. George R. Rembold Bldg. Co., 279 Md. 597, 603, 369 A.2d 1048, 1052 (1977) (noting that a refusal to perform when one has the ability to do so may constitute bad faith); Charles County Broadcasting Co., Inc. v. Meares, 270 Md. 321, 311 A.2d 27 (1973) (holding that the failure to execute the requisite FCC document was bad faith).

81. Beard v. S/E Joint Venture, 321 Md. 126, 140, 581 A.2d 1275, 1282 (1990).

82. *Charles County Broadcasting Co.*, 270 Md. at 326, 311 A.2d at 31.

83. *See* Sullivan v. Mosner, 266 Md. 479, 496, 295 A.2d 482, 491 (1972) (holding that evidence of bad faith would subject a trustee to liability despite an exculpatory provision).

clause in the contract between Totah and Leet barred any award of money damages.[84] In reaching its decision, the court condensed Totah's arguments for invalidating the clause into three substantive points and proceeded to systematically refute each one.[85]

First, the court rejected Totah's argument for damages based on Leet's alleged breach of the title warranty clause.[86] Totah argued that since the title warranty clause dealt specifically with breaches related to the quality of title, it governed Leet's conveyance of the property to his children to the exclusion of the more general remedies limitation clause.[87] Totah asserted that since the title warranty clause provided no protection against damage claims, he was justified in recovering monetary relief.[88] In rejecting this argument, the court looked to the lower court's verdict, which was based on Count I, alleging breach of contract through failure to settle, rather than on Count II, alleging breach of the title warranty clause.[89] The court reasoned that a decision on whether the title warranty clause applied to Totah's alleged breach of title could not prevent the remedies limitation clause from applying to a breach under Count I for failure to settle.[90]

Next, the court addressed Totah's argument characterizing Leet's conduct as unconscionable.[91] In making his argument, Totah principally relied on the language found in *Maryland-National Capital Park & Planning Commission v. Washington National Arena*:[92] "[U]nless clearly prohibited by statute, contractual limitations on judicial remedies will be enforced, absent a positive showing of fraud, misrepresentation, *overreaching, or other unconscionable conduct on the part of the party seeking enforcement.*"[93] In refuting Totah's unconscionability argument, the court looked to the situation surrounding the formation of the contract.[94] The court emphasized that the remedies limitation clause was the product of arms length bargaining between sophisticated busi-

84. *Leet*, 329 Md. at 666, 620 A.2d at 1382.
85. *Id.* at 658, 620 A.2d at 1378.
86. *Id.*
87. *See id.* at 658-59, 620 A.2d at 1378.
88. *Id.*
89. *Id.* at 659, 620 A.2d at 1378.
90. *See id.*, 620 A.2d at 1378-79. The court further stated that since no verdict was returned on Count II, there was no fact finding on whether Leet had substantially breached the title warranty clause. *Id.* Therefore, there was never any determination whether, had the two parties gone to settlement, the Leets could have produced good title as they claimed. The breach could have been cured in time for closing through the cooperation of the children. *Id.*
91. *Id.*, 620 A.2d at 1379.
92. 282 Md. 588, 386 A.2d 1216 (1978).
93. *Id.* at 611, 386 A.2d at 1231 (emphasis added).
94. *See Leet*, 329 Md. at 660-61, 620 A.2d at 1379.

nessmen.[95] Furthermore, in limiting the remedies for breaches by either party, the clause exhibited mutuality and supported an inference of a permissible business purpose.[96] The need for a remedies limitation clause was further supported by the speculative nature of the real estate deal.[97]

After examining the circumstances of formation, the court examined the remedies clause itself for evidence of unconscionability.[98] Citing the Code, the court divined the purpose of the unconscionability doctrine to be the prevention of oppression and unfair surprise, not the disturbance of risk allocation that took into account the bargaining power of the parties.[99] The court then concluded that the remedies clause demonstrated neither oppression nor unfair surprise.[100] Further, the court cited a passage from *Maryland-National* which demonstrated the reluctance of the judiciary to nullify contracts on highly elusive public policy grounds.[101] The court did not address Totah's allegations of bad faith.

Totah's third argument focused on the effect Leet's conveyance to his children had on the remedies limitation clause.[102] Totah argued that the conveyance rendered the remedy of specific performance called for under the remedies limitation clause impossible and thus made the clause inapplicable.[103] The court, however, found that because Totah remained the bona fide purchaser of the property de-

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95. *Id.* at 660, 620 A.2d at 1379.

96. *Id.* at 660-61, 620 A.2d at 1379. The element of mutuality was met by the provisions within the remedies limitation clause that dealt with defaults by either party. *See supra* note 13.

97. *Leet*, 329 Md. at 661, 620 A.2d at 1379. Courts tend to look more favorably upon remedies limitation clauses in situations where damages are difficult to calculate at the time of contract formation. *See* note 58 and accompanying text.

98. *Leet*, 329 Md. at 661, 620 A.2d at 1380.

99. *Id. See also supra* notes 78-79 and accompanying text.

100. *Leet*, 329 Md. at 661, 620 A.2d at 1380.

101. *See id.* at 662, 620 A.2d at 1380. The quoted passage from *Maryland-National* was:

> Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where 'the common sense of the entire community would . . . pronounce it' invalid. This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle.

Maryland-Nat'l, 282 Md. at 606, 386 A.2d at 1228-29 (citations omitted).

102. *Leet*, 329 Md. at 662, 620 A.2d at 1380.

103. *Id.*

spite Leet's conveyance, specific performance under the contract was still possible.[104] The court cited an extensive line of Maryland cases upholding the claims of bona fide purchasers to subsequent grantees.[105] The court also found that the expiration of Totah's loan commitment did not prevent the court from fashioning an equitable remedy.[106]

4. Analysis.—The Court of Appeals's ruling that the remedies limitation clause was not unconscionable was consistent with established Maryland law.[107] The court correctly emphasized that the contract was the result of an arm's-length deal between two sophisticated businessmen who negotiated for a permissible business purpose.[108] It

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104. *See id.* at 663, 620 A.2d at 1380-81.

105. *Id.* at 664, 620 A.2d at 1381. Maryland courts have adhered to a consistent interpretation of the bona fide purchaser doctrine. Under this doctrine, one who purchases real property with actual knowledge of prior claims to that property is not protected as the bona fide purchaser. *See* Grayson v. Buffington, 233 Md. 340, 343, 196 A.2d 893, 896 (1964) ("And it is well settled that one who purchases real property, with actual knowledge of prior equities, is not protected as a bona fide purchaser, but such a purchaser takes the property subject to the known equities . . . ."). In Westpark, Inc. v. Seaton Land Co., 225 Md. 433, 171 A.2d 736 (1961), the court stated that "[t]he general rule is that a purchaser of real estate takes subject to outstanding equitable interests in the property, which are enforceable against him to the same extent they are enforceable against the vendor, where the purchaser is not entitled to protection as a bona fide purchaser." *Id.* at 450, 171 A.2d at 743.

Maryland also imposes a duty to investigate upon the subsequent purchaser. *See* Blondell v. Turover, 195 Md. 251, 257, 72 A.2d 697, 699 (1950) ("[A] purchaser cannot fail to investigate when the propriety of the investigation is naturally suggested by circumstances known to him; and if he neglects to make such inquiry, he will be held guilty of bad faith and must suffer from his neglect."). Maryland courts have further held that constructive notice will bar a subsequent purchaser's claim. *See* Fertitta v. Bayshore Dev. Corp., 266 Md. 59, 73, 291 A.2d 662, 669 (1972) ("That which is sufficient to excite inquiry is notice of such facts as would lead an ordinarily prudent man to make an examination."); Lewis v. Rippons, 282 Md. 155, 162, 383 A.2d 676, 680 (1978) ("Even constructive notice of prior unrecorded equities will preclude the grantee from being a bona fide purchaser . . . .").

106. *See Leet*, 329 Md. at 665, 620 A.2d at 1381. Courts have endorsed the power of a court of equity to fashion remedies according to the exigencies of the particular case. *See* Castle v. Cohen, 840 F.2d 173, 178 (3d Cir. 1988) ("While a court at law usually issues an unconditional judgment, a court of equity may, in its discretion, condition its decree on some performance by the plaintiff.").

In closing, the court made a final procedural ruling in favor of Leet. *Leet*, 329 Md. at 666, 620 A.2d at 1382. Totah maintained that Leet had failed to preserve his claim on appeal by neglecting to make any post-charge exception to the instruction to the jury to ignore the remedies limitation clause. *Id.* The court dismissed Totah's argument, noting that the issue of the applicability of the clause had been fully argued twice by both parties. *Id.*; *see supra* text accompanying notes 39-46. Under these unique circumstances, the court reasoned that Leet's claim had been preserved. *Leet*, 329 Md. at 666, 620 A.2d at 1382.

107. *See supra* text accompanying notes 77-79.

108. *See Leet*, 329 Md. at 660, 620 A.2d at 1379; *see also* Flow Indus., Inc. v. Fields Constr. Co., 683 F. Supp. 527, 531 (D. Md. 1988) ("Because the transactions here involved are

would be difficult to characterize the terms of a land contract as an unfair surprise to a real estate developer, particularly considering that the instrument was drafted at Totah's own office.[109] Furthermore, the remedies limitation clause exhibited mutuality by defining and limiting remedies for both the seller and the purchaser in the event of a breach.[110] The court also correctly indicated that, due to the complicated nature of the real estate deal, computing damages in the event of a breach would be difficult.[111] This factor is one that is frequently considered in support of a remedies limitation clause.

The court's endorsement of the remedies limitation clause reaffirmed its commitment to a judicially prudent stance toward private contracts. The decision assured private parties that, absent evidence of unconscionability, the instruments they negotiate will be legally enforceable. The court refused to reallocate the risk as defined by the parties through a redefinition of their agreement and eschewed the imposition of its own judgment on the fairness and providence of the contract terms.

The court's holding that specific performance remained available to Totah despite Leet's subsequent conveyance to his children was also consistent with established Maryland precedent.[112] The children, as subsequent purchasers, had an affirmative duty to investigate the title; they were not bona fide purchasers.[113] Thus, the court correctly concluded that Leet's conveyance did not preclude the remedy of specific performance.[114]

The court failed, however, to address Totah's allegations of bad faith, an omission that may have significant ramifications on the use of private contracts. As quoted by the court, Totah's bad faith claims were based on Leet's "'(1) attempting to extract from Totah sums vastly in excess of the contract price; (2) deliberately disabling himself from conveying the Property by unauthorized conveyances to his children; and (3) persisting in his default for such a protracted period of time that Totah's ability to perform expired together with a loan com-

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commercial ones involving business entities, the clauses are presumptively valid."); Schrier v. Beltway Alarm Co., 73 Md. App. 281, 294-95, 533 A.2d 1316, 1322-23 (1987) (assessing the business nature of the relationship between a burglar alarm company and its client).

109. *See Leet*, 329 Md. at 660, 620 A.2d at 1379.

110. *Id.*

111. *Id.* at 661, 620 A.2d at 1379; *see also Schrier*, 73 Md. App. at 291, 533 A.2d at 1320 (recognizing the difficulty in computing damages as a factor to be considered).

112. *Leet*, 329 Md. at 663-64, 620 A.2d at 1380-81; *see supra* note 105.

113. *See supra* note 105.

114. *See Leet*, 329 Md. at 663, 620 A.2d at 1380-81.

mitment that simply could not be renewed.'"[115] The court did not address Totah's first allegation of bad faith at all and merely addressed the second two in a circuitous manner so as to benefit Leet. For example, instead of focusing on Leet's attempt to convey the property as evidence of his bad faith, the court emphasized only that his actions did not infringe upon Totah's bona fide purchaser status.[116] Similarly, the court stressed that the circuit court could redress the predicament Totah was placed in as a result of Leet's protracted default, rather than focusing on the fact that Leet intentionally created that predicament.[117]

Had the court confronted the issue of bad faith, it would have had to recognize the abundant evidence of Leet's bad faith in the record. Maryland courts have endorsed the notion that "'the vendor acts in bad faith [when] . . . having title he refuses to convey, or disables himself from conveying.'"[118] Further, bad faith has been described as "'that shown by a seller who refuses to perform when able to do so.'"[119] Leet was well able to perform, but persisted in making extreme demands on Totah.[120] In fact, Leet's acquisitive and self-serving behavior was the foremost cause of the contract breakdown.[121]

Prior to *Leet*, the Court of Appeals held that the exercise of bad faith by a party to a contract may estop enforcement of a remedies limitation clause or exculpatory provisions when the parties share a fiduciary relationship.[122] A recent decision of the court suggested extending the applicability of the bad faith doctrine beyond fiduciary relationships.[123] Moreover, Maryland courts have recognized the bad faith doctrine in the context of business relationships[124] and consist-

115. *Id.* at 660, 620 A.2d at 1379.

116. *See id.* at 663, 620 A.2d at 1380-81.

117. *See id.* at 665, 620 A.2d at 1381-82.

118. Hupp v. George R. Rembold Bldg. Co., 279 Md. 597, 602, 369 A.2d 1048, 1051 (1977) (quoting Hammond v. Hannin, 21 Mich. 374, 387 (1870)).

119. *Id.* at 603, 369 A.2d at 1052 (quoting Horner v. Beasley, 105 Md. 193, 198, 65 A. 820, 822 (1907)).

120. *See supra* notes 23-25, 28, 33-35 and accompanying text.

121. *Id.*

122. *See* Sullivan v. Mosner, 266 Md. 479, 496, 295 A.2d 482, 491 (1972) (holding that an exculpatory provision did not protect a trustee from liability for acts "committed in bad faith or intentionally or with reckless indifference").

123. *See* Beard v. S/E Joint Venture, 321 Md. 126, 140, 581 A.2d 1275, 1282 (1990) (extending bad faith from the limitations of "fraud, malice, and the like" in the context of a real estate transaction).

124. *See supra* notes 80-83 and accompanying text; *see also Beard*, 321 Md. at 126, 581 A.2d at 1275 (recognizing bad faith in the context of a real estate negotiation); Charles County Broadcasting Co. v. Meares, 270 Md. 321, 334, 311 A.2d 27, 35 (1973) (recognizing bad faith in the context of a contract to sell a radio station).

ently have held that exculpatory clauses afford no protection from liability for intentional or reckless acts.[125] In *Leet*, the court nevertheless refused to extend the bad faith doctrine to encompass remedies limitation clauses. Perhaps the court was reluctant to impose behavioral guidelines on sophisticated parties to business transactions, but by refusing to confront the issue of the exercise of bad faith in connection with remedies limitation clauses, the court significantly altered the relationship between vendors and purchasers in land sale contracts.

Remedies limitation clauses tend to favor vendors, particularly in the context of land sale transactions.[126] By permitting bad faith conduct to exist legally under a remedies limitation clause, the court granted even more of an advantage to vendors under such contracts. Vendors are now free to engage in harmful and opportunistic behavior without fear of invalidating remedies limitation clauses. In so allowing, the court, while attempting to reaffirm its commitment to the principles of freedom of contract, may actually have undermined the utility of that freedom. As a result of the *Leet* decision, parties may hesitate to enter into contracts under which a party can engage in bad faith behavior without repercussion.

5. Conclusion.—In *Leet*, the Court of Appeals upheld a remedies limitation clause in a private real estate contract. In so ruling, the court fortified the power of private parties to make legally enforceable contracts absent strong showings of contravening public policy or unconscionability concerns. The court's diffident position towards interfering in private contracts was justified considering the potentially calamitous effects judicial interference might have on private negotiations of contracts. However, by avoiding an opportunity to extend the bad faith doctrine to include actions committed under a contractual obligation limiting remedies, the court may have unwittingly included an "Achilles heel" in its attempt to encourage freedom of contract. The court's validation of rather questionable conduct under a real estate contract may ultimately deter parties from entering into agreements under which they cannot obtain a judicial remedy for bad faith conduct.

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125. *See supra* note 56.

126. *See* Elizabeth Warren, *Formal and Operative Rules Under Common Law and Code*, 30 UCLA L. REV. 898, 913 (1983) ("'A liquidated damages provision in a land sale contract is usually to the advantage of the vendor.'") (quoting Fabian v. Sather, 316 N.W.2d 10, 13 (Minn. 1982)).

V. CRIMINAL LAW

A. *Intent and Claim of Right as Elements of Robbery in Maryland*

In *Jupiter v. State*,[1] the Court of Appeals addressed the issue of "whether forcibly taking from a licensed seller of alcoholic beverages beer that the seller intended to sell to legally eligible members of the public constitutes robbery where full payment is made."[2] The court held that such circumstances evidence a felonious intent and do not afford the defendant a claim of right.[3] In so holding, the court abrogated the claim of right defense to robbery when the transaction would have been illegal even if consensual.[4] The court's holding was consistent with Maryland decisions construing felonious intent, the common law of felonious intent, and sound public policy.

1. The Case.—Parched from a day's duck hunting, John Mitchell Jupiter entered Captain John's Crab House and Marina (Captain John's) and asked to purchase a six-pack of beer.[5] Warren Yates, the owner of Captain John's, replied that he would not sell the beer to Jupiter because he appeared to be intoxicated.[6] Jupiter pleaded with Yates to sell him a single can of beer, but Yates again refused.[7] At that point, the discussion ended, and Jupiter left the establishment.[8] He returned moments later carrying a shotgun that he had retrieved from his vehicle.[9] Positioning the gun on the counter so that it pointed at Yates, Jupiter once again inquired, "Are you going to sell it to me now?"[10] "Yes, sir," replied Yates as he produced a six-pack of Budweiser from a cooler behind the counter.[11] In the meantime, Jupiter had placed a twenty-dollar bill on the counter.[12] Yates took the bill and gave Jupiter sixteen dollars in change.[13] With his change and

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1. 328 Md. 635, 616 A.2d 412 (1992).
2. *Id.* at 636, 616 A.2d at 413.
3. *Id.* at 639-40, 616 A.2d at 414-15.
4. *Id.* at 646, 616 A.2d at 418.
5. *Id.* at 636, 616 A.2d at 413.
6. *Id.* Jupiter probably appeared intoxicated because earlier that day he and three friends drank two and one-half cases of beer. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* The shotgun contained one shell. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 636-37, 616 A.2d at 413.
13. *Id.* at 637, 616 A.2d at 413.

beer in hand, Jupiter left Captain John's and drove away.[14] An employee of Captain John's notified the police, who stopped and arrested Jupiter.[15]

A jury in the Circuit Court for Charles County found Jupiter guilty of robbery with a deadly weapon, robbery, assault, and driving under the influence of alcohol.[16] Arguing that his conduct did not constitute robbery, Jupiter appealed to the Maryland Court of Special Appeals.[17] He relied primarily on *The Fisherman's Case*,[18] decided in sixteenth-century England, in which a fisherman who was going to the market with some fish to sell refused to sell the fish to the defendant.[19]

> "[W]hereupon the [defendant] tooke away some of the Fishermans [sic] fishes against his will, and gave him more money for them than they were worth, but the Fisherman was thereby put in feare, whereupon the other was indicted . . . but judgment was respited, for that the court doubted whether it was felony or no."[20]

Accordingly, Jupiter argued that *The Fisherman's Case* held that one who forces a merchant to sell goods intended for sale is not guilty of robbery and cited several commentators in support of this view.[21] He claimed that "the facts of *The Fisherman's Case* portray the lack, as a matter of law, of the *mens rea* necessary to support common law larceny or robbery."[22] The Court of Special Appeals was not persuaded by this argument and affirmed the circuit court in an unreported opinion.[23] The Court of Appeals granted *certiorari* to determine if the

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14. *Id.*

15. *Id.* Jupiter was arrested because his vehicle met the description the employee had given and because he was suspected of driving under the influence of alcohol. *Id.*

16. *Id.* The court sentenced Jupiter to 10 years for robbery with a deadly weapon, merged the robbery and assault charges, and imposed a concurrent 60-day sentence for driving under the influence. *Id.*

17. *Id.*

18. *The Fisherman's Case* was decided circa 1584 and was reported by a number of commentators. *See, e.g.*, M. DALTON, THE COUNTRY JUSTICE 235 (1622); 2 E. EAST, PLEAS OF THE CROWN 661-62 (1803); 1 W. HAWKINS, PLEAS OF THE CROWN 98 (4th ed. 1762). Jupiter contended that *The Fisherman's Case* was controlling in the instant case because it established a common law principle that has never been altered in Maryland. *Jupiter*, 328 Md. at 638-39, 616 A.2d at 414.

19. DALTON, *supra* note 18, at 235.

20. *Id.*

21. *Jupiter*, 328 Md. at 637-39, 616 A.2d at 413-14. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 243 (1769) ("But it is doubted, whether the forcing of a higgler or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.") (footnote omitted).

22. *Jupiter*, 328 Md. at 639, 616 A.2d at 414.

23. *Id.* at 637, 616 A.2d at 413.

State proved robbery.[24] By a five to two majority, the court affirmed the decision of the Court of Special Appeals, finding that Jupiter had the necessary intent to commit robbery and had no claim of right to the beer.[25]

2. *Legal Background.*—In Maryland, robbery is a common law offense.[26] Courts have defined it as "the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear."[27] Maryland law defines property as "anything of value."[28] Although the amount of value is relevant only with respect to sentencing, "[t]hat there is *some* value, however, *is* an element of the crime, for, if the item at issue has no value whatever, it is not 'property' under the statute."[29] In order for the taking to be felonious, it must be done with a specific intent and without a claim of right.[30]

a. Intent.—In *Williams v. State*,[31] the court explained that "[t]he word 'felonious' when used in connection with the taking of property means a taking with the intent to steal."[32] Intent to steal is demonstrated where the defendant, at the time of the taking, has the "intention of converting [the property] to a use other than that of the owner without his consent."[33] Where consent is obtained by fraud, force or intimidation, it does not constitute a valid consent and will not negate the felonious intent.[34]

b. Where Payment is Made.—Prior to *Jupiter*, Maryland courts had not considered the effect that payment for goods held out for sale has on the intent to deprive a merchant of property. Other jurisdictions, however, have confronted circumstances not unlike those of the *Fisherman's Case* of 1584. In *Mason v. State*,[35] for example, the Supreme Court of Arkansas decided a case in which the defendants insisted that a merchant, who kept beer for sale in his house, sell a keg

24. *Id.*
25. *Id.* at 643, 646, 616 A.2d at 416, 418.
26. Williams v. State, 302 Md. 787, 792, 490 A.2d 1277, 1280 (1985).
27. *Id.*
28. MD. ANN. CODE art. 27, § 340(h) (1992).
29. Stackowitz v. State, 68 Md. App. 368, 373-74, 511 A.2d 1105, 1108 (1986).
30. *Jupiter*, 328 Md. at 639, 616 A.2d at 414.
31. 302 Md. 787, 490 A.2d 1277 (1985).
32. *Id.* at 792-93, 490 A.2d at 1280.
33. State v. Gover, 267 Md. 602, 606, 298 A.2d 378, 381 (1973).
34. Farlow v. State, 9 Md. App. 515, 517, 265 A.2d 578, 580 (1970).
35. 32 Ark. 238 (1877).

of beer to them.[36] The merchant refused to sell the beer because he had gone to bed.[37] The following morning, he discovered that a gallon of beer, worth about thirty cents, had been taken.[38] The defendants returned the next day, admitted to the taking, and offered to pay three dollars for the beer.[39] The merchant refused the money, and the defendants were tried and convicted of larceny.[40] Reasoning that "[a] felonious or criminal intent[ ] is an essential constituent of larceny,"[41] the appellate court held that the intended payment contradicted the requisite felonious intent and reversed the decision.[42]

Similarly, in *Pyles v. State*,[43] the Texas Court of Criminal Appeals was confronted with a case in which the defendant took several bundles of oats from a field.[44] The defendant testified that he intended to pay for the oats when he arrived at the owner's residence, a quarter of a mile from where the oats were taken, but the owner intercepted him along the way and made him throw the oats into the road.[45] The trial court failed to give an instruction that if the defendant had an intent to pay for the oats, he was not guilty of a felonious taking.[46] Reversing the guilty verdict, the appellate court remanded the case and instructed "that if appellant, when he took the oats, had no fraudulent intent, but took them with a view of paying for the same, and the jury so believed, he was entitled to an acquittal."[47] Two modern courts have reached an analogous conclusion where the defendants took property with an intent to pay.[48]

c. Lucri Causa.—*Lucri causa* refers to the defendant's intent to appropriate the thing taken to his benefit or to derive a profit from

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36. *Id.*

37. *Id.*

38. *Id.* at 239.

39. *Id.* The merchant said that he would accept $30, but the defendants refused. *Id.*

40. *Id.* at 238.

41. *Id.* at 239.

42. *Id.* at 240. The court emphasized that the merchant kept beer for sale, that the defendants were intimately acquainted with the merchant and had been his customers for years, and "the only reason for not letting them have it . . . was that he had retired to bed, and did not wish to get up." *Id.*

43. 136 S.W. 464 (Tex. Crim. App. 1911).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* Lee v. Commonwealth, 105 S.E.2d 152 (Va. 1958) (defendant took tire from a service station); People v. Jaso, 84 Cal. Rptr. 567 (Cal. App. 1970) (defendant took article of clothing from department store).

the theft.[49] At common law, *lucri causa* was an essential element of the felonious intent necessary to prove larceny or robbery.[50] The old English case of *Rex v. Morfit*[51] demonstrates the degree to which courts have stretched to find the requisite *lucri causa.* There, the defendants, who were in charge of taking care of their master's horses, were tried for the felonious stealing of two bushels of beans.[52] The jury found that the defendants intended to give the beans to their master's horses.[53] Reasoning that "the purpose to which the prisoners intended to apply the beans did not vary the case," eight of the eleven judges declared the defendants guilty of a felony.[54] They insisted that "the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, . . . but the men's labour was lessened, so that the '*lucri causa*,' to give themselves ease, was an ingredient in the case."[55]

Despite the necessity of *lucri causa* at common law, the Court of Appeals, in *Canton National Bank v. American Bonding & Trust Co.*,[56] repudiated the *lucri causa* requirement.[57] The court decided to align itself with "the weight of authority[, which holds that] the felonious intent required for larceny is not necessarily an intent to gain advantage for the defendant. An intention to deprive the owner of his property is enough."[58]

d. Claim of Right.—Section 343(c) of Maryland's consolidated theft statute provides: "It is a defense to the offense of theft that . . . [t]he defendant acted under a good faith claim of right to the property involved."[59] Although section 343 does not define claim of right, "it is clear that this defense usually arises when a person asserts a right to the property on demand in satisfaction of a claim."[60]

A number of jurisdictions, due to public policy considerations against condoning self-help and the use of force to obtain property,

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49. Rex v. Morfit, 168 Eng. Rep. 817 (1816). *See generally* 50 AM. JUR. 2d *Larceny* § 39 (1970).

50. *See supra* note 49.

51. 168 Eng. Rep. 817 (1816).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. 111 Md. 41, 73 A. 684 (1909).

57. *Id.* at 44-45, 73 A. at 685.

58. *Id.* (citations omitted).

59. MD. ANN. CODE art. 27, § 343(c) (1992).

60. Sibert v. State, 301 Md. 141, 148, 482 A.2d 483, 487 (1984).

have limited the claim of right defense in certain cases.[61] For example, where the "defendant's purported 'right' was based on his participation in [a] forgery ring,"[62] the California Supreme Court stated:

> As a matter of law, one cannot have a good faith belief that he has a right to property when that "right" is rooted in a notoriously illegal transaction. A fortiori one cannot have such a belief when he actually knows the transaction on which the "right" is based is illegal.[63]

The Court of Special Appeals adopted an analogous construction of claim of right in *Cates v. State*.[64] "The phrase *claim of right* . . . , when applied to an intentional taking of property, must be given a limited and not a broad interpretation. [It] must be taken to require a legally recognizable right which can be successfully asserted in our courts."[65] Accordingly, the defendant, who lost money in a crap game and recaptured the money from the winner by force, was guilty of robbery.[66]

3. The Court's Reasoning.—In *Jupiter*, the Court of Appeals confronted the question of whether forcibly taking beer from a licensed seller of alcoholic beverages constitutes robbery when full payment is made.[67] The court began its analysis with a synopsis of the commentaries supporting Jupiter's interpretation of *The Fisherman's Case*,[68] but

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61. Several courts have held that the claim of right defense is available only where the defendant was reclaiming a specific object that was the basis of a prior claim of right. *See, e.g.*, Thomas v. State, 584 So. 2d 1022, 1025 (Fla. Dist. Ct. App.), *appeal dismissed*, 587 So. 2d 1331 (Fla. 1991); State v. Brighter, 608 P.2d 855, 859 (Haw. 1980); People v. Reid, 508 N.E.2d 661, 664 (N.Y. 1987); State v. Winston, 295 S.E.2d 46, 51 (W. Va. 1982); Edwards v. State, 181 N.W.2d 383, 387-88 (Wis. 1970).

Other courts have held that the claim of right defense is not available where the defendant sought to retake the profits of illegal activity. *See, e.g.*, Cates v. State, 21 Md. App. 363, 374, 320 A.2d 75, 82 (gambling losses), *cert. denied*, 272 Md. 739 (1974); *Reid*, 508 N.E.2d at 664 (drug money); Commonwealth v. Sleighter, 433 A.2d 469, 471 (Pa. 1981) (gambling).

Finally, although there is no consensus on this point, some courts have suggested that claim of right should be abolished entirely as a defense to robbery. *See, e.g.*, State v. Schaefer, 790 P.2d 281, 284 (Ariz. Ct. App. 1990); *Thomas*, 584 So. 2d at 1026; State v. Ortiz, 305 A.2d 800, 801-02 (N.J. Super. Ct. App. Div. 1973); *Sleighter*, 433 A.2d at 471.

62. People v. Gates, 743 P.2d 301, 310 (Cal. 1987), *cert. denied*, 486 U.S. 1027 (1988).

63. *Id.* (citation omitted).

64. 21 Md. App. 363, 320 A.2d 75, *cert. denied*, 272 Md. 739 (1974).

65. *Id.* at 369, 320 A.2d at 79.

66. *Id.* at 374, 320 A.2d at 82.

67. *Jupiter*, 328 Md. at 636, 616 A.2d at 413.

68. *Id.* at 637-38, 616 A.2d 413-14 (citing DALTON, *supra* note 18; BLACKSTONE, *supra* note 21; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 343-45 (3d ed. 1982)); *see also supra* notes 18-22 and accompanying text (describing the facts and outcome of *The Fisherman's Case*). The court also cited § 223.1 (3)(c) of the Model Penal Code, which provides a defendant with a claim of right defense where he or she "took property exposed

quickly turned to other commentators, who in criticizing the case, have concluded that it presented a question of fact, rather than law, "as to the defendant's intent."[69]

Furthermore, even if *The Fisherman's Case* was decided as a matter of law, the court concluded that the facts in *Jupiter* were distinguishable from those in *The Fisherman's Case*.[70] "Whatever the vitality of that 400 year old decision, the facts of this case are different. It was not because of the '[p]erverseness of his [h]umor' that Yates refused to sell beer to Jupiter. Yates was prohibited by law from selling to intoxicated persons."[71] Because Yates informed Jupiter that he could not sell beer to an intoxicated patron, "the evidence clearly was sufficient to support jury findings that Jupiter knew that he did not have a right to purchase beer, that he intended to take it in any event, and that he took it away with the intent permanently to deprive the owner of it."[72] In order for Jupiter to defend against the robbery charge as a matter of law, the court indicated that he must demonstrate that he lacked an intent to deprive the victim of any value, or "that paying for the goods conclusively establishes a good faith claim of right to the goods."[73] The court explained that Jupiter was not entitled to either defense.

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for sale, intending to purchase and pay for it promptly." *Id.* (citing MODEL PENAL CODE § 223.1 (3)(c) & cmt. at 157-59 (1980)).

69. *Jupiter*, 328 Md. at 638, 616 A.2d at 414; *see, e.g.*, 2 RUSSELL ON CRIME 964 (Turner 11th ed. 1958) ("It does not necessarily follow as a conclusion of law that if the value of the thing taken is offered to be paid at the time, the intent is, therefore, not felonious, yet such a circumstance could be evidence tending to show a belief in a right to take the thing upon payment for it.") (citation omitted); EAST, *supra* note 18, at 662 ("And the circumstance of the party's offering the full value or more at the time ought to be left to them [the jury] to shew that his intention was not fraudulent, and so not felonious: for it does not necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious; though it is, I apprehend, pregnant evidence of the negative.") (citation omitted)); *see also* Pyles v. State, 136 S.W. 464, 464-65 (Tex. Crim. App. 1911).

70. *Jupiter*, 328 Md. at 639, 616 A.2d at 414.

71. *Id.* (quoting 1 W. HAWKINS, PLEAS OF THE CROWN 97 (4th ed. 1762). Section 118 of Article 2B provides that "[a] licensee licensed under this article, or any employee of the licensee, may not sell or furnish any alcoholic beverages at any time to . . . any person who, at the time of the sale, or delivery, is visibly under the influence of any alcoholic beverage." MD. ANN. CODE art. 2B, § 118(a)(1)(ii) (1990). Section 200 provides:

> Any person violating the provisions of this article for which no penalty, other than the suspension or revocation of a license or permit, is provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than one thousand dollars ($1,000.00) or to imprisonment for not more than two years in the House of Correction, or jail, or both fined and imprisoned.

MD. ANN. CODE art. 2B, § 200 (1990).

72. *Jupiter*, 328 Md. at 640, 616 A.2d at 414.

73. *Id.*

a. Felonious Intent.—In order to determine whether Jupiter lacked the intent to permanently deprive Yates of value, the court analyzed two elements of felonious intent.[74] First, the court established that although "[a] theft must have as its object something of value[, q]uantifying the value is not important to whether a theft was committed. Nevertheless, it is essential that the thing taken have *some* value."[75] The value requirement of common law larceny "merely ensures that the defendant's conduct constitutes a crime against property."[76] The value requirement was met in the instant case.

Second, the court noted the repudiation in Maryland of the common law requisite of *lucri causa*.[77] Because *lucri causa* is no longer a necessary element of robbery in Maryland, the *Jupiter* court stated: "Our repudiation of any *lucri causa* requirement exercised this Court's power to change the common law and is applicable to Jupiter's conduct. Therefore, Jupiter cannot rely on *The Fisherman's Case* for the proposition that robbery requires an intent to deprive the possessor of value."[78]

b. Claim of Right.—Because robbery is a common law crime in Maryland,[79] the court evaluated Jupiter's claim of right defense under common law principles.[80] First, the court distilled Jupiter's de-

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74. *Id.* at 640-43, 616 A.2d at 415-16.

75. *Id.* at 640, 616 A.2d at 415; *see* MD. ANN. CODE art. 27, § 340(h) (1992); Fisher v. Warden, 224 Md. 669, 670, 168 A.2d 520, 521 (1961); Stackowitz v. State, 68 Md. App. 368, 372-74, 511 A.2d 1105, 1107-08, *cert. denied*, 307 Md. 599, 516 A.2d 569 (1986).

76. *Jupiter*, 328 Md. at 640, 616 A.2d at 415. Explaining that the value requirement is rarely an issue, the court proffered a hypothetical situation where the requirement might present a quandary:

> If, for instance, a person asks another for the time of day, and the other refuses, but the person who inquired learns the time by glancing at the other's watch, the one who looked at the watch has not committed theft because that person did not take property of value. If an accused held a gun to a victim's head to force the victim to divulge the time, arguably the accused did not commit *robbery*, for the same reason.

Id.

77. *Id.* at 643, 616 A.2d at 416; *see supra* notes 49-58 and accompanying text; *see also* Stebbing v. State, 299 Md. 331, 352, 473 A.2d 903, 913 (*lucri causa* held not required when the clothes of a rape victim were taken without the intent to derive a benefit from the taking), *cert. denied*, 469 U.S. 900 (1984); 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.5, at 357 (1986).

78. *Jupiter*, 328 Md. at 643, 616 A.2d at 416 (citations omitted).

79. West v. State, 312 Md. 197, 202, 539 A.2d 231, 233 (1988).

80. *Jupiter*, 328 Md. at 643-44, 616 A.2d at 416. Maryland's consolidated theft statute provides that "[i]t is a defense to theft that: (1) The defendant acted under a good faith claim of right to the property involved." MD. ANN. CODE art. 27, § 343(c) (1992). Because § 343 does not define claim of right, *see* Sibert v. State, 301 Md. 141, 148, 482 A.2d 483, 487 (1984), the statute essentially codifies the common law meaning of the defense.

fense into a "supposed consent" argument that "those who force merchants of goods to sell their goods do not commit robbery because the merchants have been forced only to do what the merchants held themselves out as willing to do."[81] Assuming that in *The Fisherman's Case* "the evidence of *mens rea* was insufficient as a matter of law to convict the fish 'purchaser' because of a claim of right,"[82] the court proceeded to distinguish *Jupiter* from *The Fisherman's Case*.[83] Jupiter knew that the merchant was prohibited from selling the goods because of a criminal statute,[84] whereas the fish purchaser was refused the fish because of the fisherman's mood.[85] Consequently, Jupiter did not possess a good faith claim of right to the beer.[86]

Although the *Jupiter* court agreed with the public policy underlying the decisions of other jurisdictions to limit the claim of right defense,[87] it "decline[d] the State's invitation to abrogate the [claim of right] defense altogether."[88] The court did hold, however, that "the defense is not applicable to robbery when the transaction that the robbery effects would be illegal even if it were consensual."[89] Although the court noted that "the criminal laws proscribing the sale of alcoholic beverages to apparently intoxicated persons are directed at the seller rather than the buyer . . . it is reasonable to charge the buyer with knowledge that the transaction itself was illegal."[90] Accordingly, the court held Jupiter was not entitled to a good faith claim of right defense as a matter of law.[91]

4. Analysis.—

a. Intent.—Although the dissent accused the court of "distort[ing] the common law of larcenous intent beyond recognition,"[92] the court's analysis of the intent requirement was consistent with Maryland decisions construing felonious intent and the common law of felonious intent. Maryland has defined felonious intent as the "intention of converting [the property taken] to a use other than that of

81. *Jupiter*, 328 Md. at 644, 616 A.2d at 416.
82. *Id.* at 645, 616 A.2d at 417.
83. *Id.*
84. *See* MD. ANN. CODE art. 2B, § 118(a)(1)(ii) (1990).
85. *Jupiter*, 328 Md. at 645, 616 A.2d at 417.
86. *Id.*
87. *Id.* at 645-46, 616 A.2d at 417; *see supra* notes 61-66 and accompanying text.
88. *Jupiter*, 328 Md. at 646, 616 A.2d at 418.
89. *Id.*
90. *Id.* at 647, 616 A.2d at 418.
91. *Id.*
92. *Id.* at 653, 616 A.2d at 421 (Eldridge, J., dissenting).

the owner without his consent."[93] Because Yates's intended "use" of the beer was to sell it to customers who were not visibly intoxicated, that intent was violated when Jupiter forced Yates to sell to him. Furthermore, consent obtained by fraud, force, or intimidation does not negate felonious intent.[94] The sale was not consensual because consent was procured only by pointing the shotgun at Yates to frighten and intimidate him. Finally, a defendant need not have the intent to derive a profit from the taking to have a felonious intent.[95] Therefore, it is irrelevant that Jupiter compensated Yates for the value of the beer and that he obviously lacked the intent to derive a profit from the taking. Thus, Jupiter manifested the requisite felonious intent for robbery.

The court also correctly distinguished the *Fisherman's Case* from *Jupiter*.[96] Unlike the Fisherman, Yates did not hold out his merchandise for sale to the general public. Rather, as mandated by Maryland law, the liquor was for sale *only* to legally eligible—in this case, sober—members of the public.[97] Yates intended to operate his business within the confines of the law and to avoid the penalties for its violation.[98]

Finally, the dissent accused the majority of "fail[ing] to set forth any guiding and logical principles for identifying those circumstances where the 'intent to steal' element is abrogated."[99] The court did not, however, abrogate the intent to steal requirement. Rather, it simply analyzed the defendant's conduct in terms of the existing elements of felonious intent and concluded that those elements were satisfied.[100]

b. Claim of Right.—In *Jupiter*, the Court of Appeals joined those jurisdictions which, due to public policy reasons, have limited the claim of right defense.[101] Although the court declined to abro-

93. State v. Gover, 267 Md. 602, 606, 298 A.2d 378, 381 (1973) (emphasis omitted).

94. Farlow v. State, 9 Md. App. 515, 517, 265 A.2d 578, 580 (1970).

95. Canton Nat'l Bank v. American Bonding & Trust Co., 111 Md. 41, 44-45, 73 A. 684, 685 (1877).

96. The other cases that the dissent relies upon for support, *see Jupiter*, 328 Md. at 649-51, 616 A.2d at 419-20 (Eldridge, J., dissenting), may be distinguished on the same basis. For a discussion of these cases, see *supra* notes 35-48 and accompanying text.

97. *E.g.*, MD. ANN. CODE art. 2B, § 118.

98. That the goods were held out only to sober members of the public takes the case out of the dissent's formulation of the rule that "[i]f the defendant intends to pay for the goods, and they are goods held out for sale to the general public, then the intent element of larceny is absent." *Jupiter*, 328 Md. at 651, 616 A.2d at 420 (Eldridge, J., dissenting).

99. *Id.* at 652, 616 A.2d at 421 (Eldridge, J., dissenting).

100. *Id.* at 639-43, 616 A.2d at 414-16; *see supra* notes 74-78 and accompanying text.

101. *Jupiter*, 328 Md. at 645-46, 616 A.2d at 417-18; *see also supra* notes 61-65 and accompanying text.

gate the claim of right defense entirely,[102] the court abolished claim of right as a defense to robbery "when the transaction that the robbery effects would be illegal even if it were consensual."[103] In other words, even though a merchant's "supposed consent" to a sale might be inferred from the holding of the merchandise out for sale to the public, when a seller or buyer is legally prohibited from consummating the sale, a buyer may not benefit from a claim of right defense to robbery. This holding not only supports the public policy of discouraging forcible self-help, but also is consistent with the theory behind a *good faith* claim of right defense.[104] Because Jupiter was aware of the vendor's refusal to consent to the sale, whatever claim of right Jupiter had was not held in good faith.

5. Conclusion.—In *Jupiter v. State*, the Court of Appeals held that "forcibly taking from a licensed seller of alcoholic beverages beer that the seller intended to sell to legally eligible members of the public constitutes robbery where full payment is made."[105] Consistent with Maryland precedent, the court found adequate evidence of felonious intent.[106] The court also reasoned that under the circumstances, full payment did not impart the defendant a good faith claim of right.[107] In so holding, the court abrogated the claim of right defense to robbery when the transaction would be illegal even if consensual.[108] This holding is consistent with both sound public policy and the legislative mandate of Maryland's consolidated theft statute.[109]

IRENE BUTTERMAN

B. Limiting the Right to Imperfect Self-Defense

In *Richmond v. State*,[1] the Court of Appeals addressed the issue of whether the mitigation doctrine of imperfect self-defense, available to defendants accused of nonhomicide crimes, requires proof of malice.

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102. *Jupiter*, 328 Md. at 646, 616 A.2d at 418.

103. *Id.* The court merely extended the holding in Cates v. State, 21 Md. App. 363, 320 A.2d 75 (1974), to encompass an illegal purchase. *See supra* notes 64-66 and accompanying text.

104. *Jupiter*, 328 Md. at 646-47, 616 A.2d at 418; *see* MD. ANN. CODE art. 27, § 343(c)(1) (quoted *supra* note 80); *cf.* M.P.C. § 223.1(3)(c) (omitting "good faith" qualification) (cited *supra* note 68).

105. *Jupiter*, 328 Md. at 636, 643, 646, 616 A.2d at 413, 416, 418.

106. *Id.* at 640-43, 616 A.2d at 415-16.

107. *Id.* at 643-47, 616 A.2d at 416-18.

108. *Id.* at 646, 616 A.2d at 418.

109. *See supra* note 80.

1. 330 Md. 223, 623 A.2d 630 (1993).

Characterizing imperfect self-defense as a mitigator peculiar to the crime of homicide, the court limited its application to murder and its inchoate forms.[2] Specifically, it ruled that imperfect self-defense does not negate malice in malicious wounding cases because the definition of malice in that crime does not imply the absence of mitigation.[3]

1. The Case.—In the early morning hours of January 6, 1990, a Prince George's County police officer was dispatched to the scene of an affray.[4] Emerging from his cruiser, the officer encountered two men.[5] The first man, Thomas Monroe Winston, was bleeding profusely from lacerations to his head and face.[6] The second man, Lamont Lee Richmond, stood several feet behind Winston.[7] When the officer ordered Richmond to raise his hands, he observed the suspect clutching a knife that the suspect then tossed away.[8] An investigation of the scene recovered a box cutter, a retractable knife of the type normally used to cut boxes.[9] Richmond was indicted in the Circuit Court for Prince George's County for assault with intent to murder, assault with intent to maim, assault with intent to disable, assault and battery, malicious wounding with intent to disable, and carrying a dangerous weapon openly with intent to injure.[10]

At trial, Winston maintained that Richmond attacked him without provocation.[11] Richmond alleged that Winston first assaulted him and pleaded self-defense.[12] The two men had fought on a prior occasion, and according to Richmond, Winston had continued to taunt and threaten him whenever they encountered one another, even though Richmond prevailed in the first altercation.[13] The defense argued that Richmond honestly and reasonably feared his attacker.[14] Richmond testified that in the darkness on the night of the second altercation, Winston became like a "wild man coming at [him]."[15] The

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2. *Id.* at 233, 623 A.2d at 634-35.

3. *Id.* at 232-33, 623 A.2d at 634.

4. Joint Record Extract at 17 (reproducing the direct testimony of Prince George's County Police Officer Jonathan Wright).

5. *Id.* at 12-13.

6. *Id.* at 13.

7. *Id.*

8. *Id.* at 14.

9. *Id.* at 105.

10. *Richmond*, 330 Md. at 226, 623 A.2d at 631.

11. Joint Record Extract at 175 (reproducing the unreported opinion of the Court of Special Appeals).

12. *Id.*

13. *Id.* at 112-13 (reproducing the cross-examination of Richmond).

14. *Id.* at 151-52 (reproducing defense counsel's closing argument).

15. *Id.* at 107.

defense asserted that Richmond's use of the knife was a result of his justifiable fear and desperation.[16] At the conclusion of the State's case, the trial court granted the defendant's motion for judgment of acquittal on the charges of assault with intent to murder and assault with intent to maim.[17]

Upon the conclusion of the case, counsel for the defendant requested an instruction on the issue of imperfect self-defense, arguing that such a finding by the jury would mitigate the remaining aggravated assault charges to assault and battery.[18] The trial court refused to issue the instruction,[19] and Richmond was found guilty of battery and malicious wounding with intent to disable.[20]

On appeal to the Court of Special Appeals, Richmond argued that the trial court erred in refusing to instruct the jury on the law of imperfect self-defense.[21] He argued that recognition of the defense would have negated the element of malice in the crime of malicious wounding and entitled him to mitigation.[22] The Court of Special Appeals noted that it had rejected a "virtually identical argument" in *Bryant v. State*[23] and summarily disposed of his argument.[24] The Court of Appeals granted certiorari to consider whether the trial court erred in not instructing the jury on imperfect self-defense.[25]

2. Legal Background.—

a. History and Theory.—The mitigation doctrine of imperfect self-defense is rooted in the common law. The Texas Court of Appeals explained the concept clearly in *Reed v. State*,[26] the "cornerstone" case for imperfect self-defense in the United States:[27]

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16. *See id.* at 103-07.

17. *Richmond*, 330 Md. at 226, 623 A.2d at 631.

18. *Id.* at 227, 623 A.2d at 631.

19. *Id.*

20. *Id.*, 623 A.2d at 631-32.

21. Richmond v. State, No. 1785, slip op. at 1-2 (Md. Ct. Spec. App. Oct. 3, 1991) (per curiam), *aff'd in part and rev'd in part*, 330 Md. 223, 623 A.2d 630 (1993).

22. *Id.* at 2.

23. 83 Md. App. 237, 245, 547 A.2d 29, 33 (1990) (holding the defense of imperfect self-defense inapplicable to statutory maiming, assault with intent to disable, and assault and battery charges).

24. *Richmond*, No. 1785, slip op. at 2.

25. *Richmond*, 330 Md. at 227, 623 A.2d at 632.

26. 11 Tex. App. 509 (1882) (reversing the defendant's murder conviction because an erroneous omission of a manslaughter jury instruction precluded the jury's consideration of the defense of imperfect self-defense).

27. *See* State v. Faulkner, 301 Md. 482, 488, 483 A.2d 759, 762 (1984) (characterizing the *Reed* decision).

> [Self-defense] may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense . . . .[28]

Since the *Reed* decision, a number of courts have come to recognize both a "perfect" and "imperfect" right to self-defense in cases of criminal homicide.[29] The right to self-defense is characterized as "perfect" when the defendant makes a *prima facie* showing of each of the four basic elements of self-defense: (1) that he did not initiate the conflict, (2) that he believed he was in imminent danger of death or grievous bodily injury, (3) that he had reasonable grounds for that belief, and (4) that he did not employ force beyond that which the exigency demanded.[30] Self-defense is "imperfect" where the defendant is unable to show at least one of the elements necessary to make out the complete defense.[31]

Because courts disagree regarding which elements must be present to constitute imperfect self-defense, the defense exists in three basic variations. One type of imperfect self-defense, as demonstrated in *Reed*, occurs when a defendant who nonfeloniously precipitates an attack is forced to kill in self-defense.[32] Another type occurs when a defendant kills as a result of employing unreasonable force in defending himself.[33] Finally, some courts have recognized the defense when

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28. *Reed*, 11 Tex. App. at 517-18.

29. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.11(b), at 271-73 (2d ed. 1986).

30. *Id.*; *see, e.g.*, Tichnell v. State, 287 Md. 695, 718, 415 A.2d 830, 842 (1980) (citing Guerrieo v. State, 213 Md. 545, 549, 132 A.2d 466, 467-68 (1957)); DeVaughn v. State, 232 Md. 447, 453, 194 A.2d 109, 112 (1963), *cert. denied*, 376 U.S. 927 (1964); Bruce v. State, 218 Md. 87, 96-97, 145 A.2d 428, 432-33 (1958).

31. *See generally* LAFAVE & SCOTT, *supra* note 29, at 271-72.

32. *See* Reed v. State, 11 Tex. App. 509, 517-18 (1982) (recognizing the defense of imperfect self-defense where the defendant was killed while defending himself against his lover's husband); *see also* People v. Deason, 384 N.W.2d 72, 74 (Mich. Ct. App. 1985); State v. Bush, 297 S.E.2d 563, 568 (N.C. 1982); State v. Flory, 276 P. 458 (Wyo. 1929). *See generally* ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 1137-41 (3d ed. 1982).

33. *See* Allison v. State, 86 S.W. 409 (Ark. 1905) (dictum); *see also Reed*, 11 Tex. App. at 517-18 (discussing the concept).

the defendant honestly, but unreasonably, believed that deadly force was necessary to prevent death or grievous bodily harm.[34]

In 1962, the *Model Penal Code* proposed its own version of imperfect self-defense.[35] Under the *Model Penal Code* version, the degree of the defendant's guilt is dependant upon his culpability as to each element of the crime.[36] Thus, an honest but unreasonable belief as to the necessity to kill amounts to negligence, and the defendant could be convicted of negligent homicide.[37]

Reflecting the doctrine's historical emergence as a mitigation defense, trial courts regularly recite a voluntary manslaughter instruction whenever the facts warrant the self-defense charge in a murder case.[38] If the defendant claims the right to imperfect self-defense, and the particular imperfection advanced is recognized in the jurisdiction as a viable defense, a murder charge may be mitigated to manslaughter.[39]

Unlike provocation, the classic mitigation defense, imperfect self-defense is grounded in "fear of life," not passion.[40] Both defenses proceed, however, on the premise that the defendant's killing was unlawful, but because of mitigating circumstances, occurred without malice aforethought—the distinguishing feature of murder.[41]

b. Imperfect Self-Defense and Maryland Law.—In 1976, the Court of Special Appeals stated that the doctrine of imperfect self-defense was "little more than an academic possibility."[42] Shortly

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34. Jurisdictions that have adopted this standard by case law include Arkansas, California, Maine, Maryland, New Mexico, and Pennsylvania. *See Allison*, 86 S.W. at 413; People v. Flannel, 603 P.2d 1, 9 (Cal. 1979); State v. Grant, 418 A.2d 154, 156 (Me. 1980); Faulkner v. State, 301 Md. 482, 499, 483 A.2d 759, 768 (1984); State v. Kidd, 175 P. 772, 774 (N.M. 1917); Commonwealth v. Collandro, 80 A. 571, 574-75 (Pa. 1911). The honest but unreasonable belief standard for imperfect self-defense is also provided for by statute. *See* ILL. ANN. STAT. ch. 750, § 5/9-2(a)(2) (Smith-Hurd Supp. 1984); 18 PA. CONS. STAT. ANN. § 2503(b) (Purdon 1983); WIS. STAT. ANN. § 940.01(2)(b) (West 1982).

35. MODEL PENAL CODE § 3.09(2) (Proposed Official Draft 1962).

36. *Id.*

37. *Id.* The Arkansas and New Jersey statutes have also taken this position. *See* ARK. STAT. ANN. § 5-2-614(a) (Michie 1993); N.J. STAT. ANN. 2C:3-9(b) (repealed 1981) (West 1993).

38. *See* People v. Lockett, 413 N.E.2d 378, 381 (Ill. 1980) (citations omitted); *Faulkner*, 301 Md. at 500-01, 483 A.2d at 769.

39. *See* ROLLIN PERKINS, CRIMINAL LAW 69 (2d ed. 1969). As Professor Perkins has observed, manslaughter has evolved into a "catch-all" concept that includes all homicides that are "neither murder nor innocent." *Id.*

40. *See* ROY MORELAND, THE LAW OF HOMICIDE 91 (1952).

41. *See* PERKINS, *supra* note 39, at 69-70.

42. Evans v. State, 28 Md. App. 640, 658 n.4, 349 A.2d 300, 314 n.4 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).

thereafter, however, the court, having recognized the doctrines of imperfect defense of another,[43] imperfect duress,[44] and imperfect defense of habitation,[45] began to cite the doctrine of imperfect self-defense with increasing, though guarded, approval.[46]

Then, in *Faulkner v. State*,[47] the Court of Special Appeals applied the defense to the charge of assault with intent to murder.[48] Premising its holding on the assertion that imperfect self-defense negates malice, a sharply divided panel concluded that the mitigating effect of imperfect self-defense "fatally erodes an assault with intent to murder charge."[49] The court reasoned that since there exists no crime of assault with intent to manslaughter, an accused may be found guilty of assault and battery when malice is negated in an assault with intent to murder charge.[50]

The subsequent appeal in *Faulkner* finally provided the Court of Appeals with an opportunity to comment on the defense of imperfect self-defense. Finding that the defendant in the case "produced evi-

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43. *See* Shuck v. State, 29 Md. App. 33, 349 A.2d 378 (1975) (reversing a conviction for second degree murder and assault with intent to murder), *cert. denied*, 278 Md. 733 (1976).

44. *See* Wentworth v. State, 29 Md. App. 110, 349 A.2d 421 (1975) (reversing conviction of second degree murder), *cert. denied*, 278 Md. 738 (1976).

45. *See* Law v. State, 29 Md. App. 457, 349 A.2d 295 (1975) (reversing conviction of second degree murder and assault with intent to murder), *cert. denied*, 378 Md. 726 (1976).

46. The advent of the recognition of the defense of imperfect self-defense in Maryland related directly to federal criminal procedure. *See* Faulkner v. State, 54 Md. App. 113, 114, 458 A.2d 81, 82 (1983) (noting that state criminal law had been "roiled by the dictates" of Mullaney v. Wilbur, 421 U.S. 684 (1975)), *aff'd*, 301 Md. 482, 483 A.2d 759 (1984). In *Mullaney*, the Supreme Court held that the Due Process Clause requires states to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. *See Mullaney*, 421 U.S. at 704.

It is arguable that this mandate, and not the doctrinal soundness of the defense of imperfect self-defense, prompted the Court of Special Appeals to acknowledge the defense. After *Mullaney*, what was once an "esoteric qualification of the doctrine of self-defense" became "viable." *See Faulkner*, 54 Md. App. at 115, 458 A.2d at 82.

In each of its 1975 and 1976 imperfect self-defense cases, the intermediate court concluded that the evidence admitted at trial raised the issue of mitigation. *See Shuck*, 29 Md. App. at 38, 349 A. 2d at 381; *Wentworth*, 29 Md. App. at 121, 349 A.2d at 428; *Law*, 29 Md. App. at 465, 349 A.2d at 299.

47. 54 Md. App. 113, 458 A.2d 81 (1983), *aff'd*, 301 Md. 482, 483 A.2d 759 (1984).

48. *Id.* at 116, 458 A.2d at 82-83.

49. *Id.* The court noted that "Mullaney v. Wilbur . . . applies to an instruction on assault with intent to murder just as surely as it applies to an instruction dealing with the murder charge itself." *Id.*

50. *Id.* In a trenchant dissent, Judge Lowe repudiated the *Shuck* line of cases. According to Judge Lowe, this "ultimate application" of an academic doctrine revealed its "stark impracticality." *Id.* at 123, 458 A.2d at 86. "The criminal law as an instrument of social control cannot allow violence to be excused solely upon the whims of the perpetrator. His conduct must be measured against some societal norm of reasonableness." *Id.* at 122-23, 458 A.2d at 86.

dence sufficient to generate a jury issue as to whether he had a subjectively honest but objectively unreasonable belief that he was in imminent danger of death or serious bodily injury,"[51] the court affirmed the intermediate court's decision and adopted the honest but unreasonable belief standard for the defense of imperfect self-defense.[52] In arriving at this judgment, the court uncritically assumed that imperfect self-defense operates to negate malice.[53] Malice, however, is a compound concept,[54] and the *Faulkner* court did not explain which element or what aspect of the count is negated by imperfect self-defense.

3. The Court's Reasoning.—In *Richmond*, the Court of Appeals limited the mitigation doctrine of imperfect self-defense to the crime of murder and its inchoate forms.[55] Although the court reversed Richmond's conviction of malicious wounding with intent to disable on separate grounds,[56] it rejected his argument that the principles of imperfect self-defense should apply to mitigate every crime requiring proof of malice.[57]

The court first explained Article 27, section 386[58]—the statute under which Richmond was convicted—and pointed out that the

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51. State v. Faulkner, 301 Md. 482, 506, 483 A.2d 759, 772 (1984).

52. *See id.*

53. *See id.* at 486, 483 A.2d at 761.

54. *See generally* PERKINS & BOYCE, *supra* note 32, at 856-61. The common law concept of malice is a vital part of the definition of many offenses including murder, mayhem, arson, libel, and malicious mischief. Each offense defines the element of malice in a slightly different manner. Most notable of these is "malice aforethought," the distinguishing aspect of the crime of murder. "[M]alice aforethought is an unjustifiable, inexcusable and unmitigated person-endangering-state-of-mind." *Id.* at 875. Professors Perkins and Boyce offer an excellent general definition of this descriptive term, rescuing it from disparagement at the hands of modern code writers:

> In brief, malice in the legal sense imports (1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and wilful doing of an act with awareness of a plain and strong likelihood that such harm may result.

Id. at 860.

55. *Richmond*, 330 Md. at 233, 623 A.2d at 634-35.

56. *See id.* at 235-36, 623 A.2d at 635-36. Although the court did not directly address the issue of due process, the court sua sponte reversed the defendant's principal conviction. Due to an erroneous instruction, Richmond was convicted of malicious wounding with intent to disable, although he had been acquitted of assault with intent to disable. *See id.* at 235, 623 A.2d at 635-36. The court took notice of the trial court's plain error and concluded that Richmond's constitutional right to a fair trial had been compromised. *See id.* at 236-37, 623 A.2d at 636.

57. *Id.* at 227-28, 623 A.2d at 632.

58. The statute reads:

types of assault proscribed under the statute are all specific intent crimes.[59] Richmond, the court stressed, was not convicted of unlawful and malicious wounding, but of unlawful and malicious wounding with intent to disable.[60] Noting its refusal in *Watkins v. State*[61] to apply imperfect self-defense to the crime of unlawful shooting with intent to disable, the court concluded that the term "malicious" in the charge against Richmond was of no significance.[62] In fact, it deemed the offenses in *Richmond* and *Watkins* "virtually identical."[63] The court maintained that even if Richmond had been charged with unlawful and malicious shooting—instead of malicious wounding with intent to disable—imperfect self-defense would not mitigate the crime because mitigation is a concept "peculiar to criminal homicide cases."[64]

Moreover, the court indicated that in homicide cases the absence of malice *is* mitigation—an extenuating circumstance that is held to attenuate the crime of murder.[65] In this sense, imperfect self-defense is analogous to provocation, the classic mitigation defense.[66] The defendant's reasonable passion is the extenuating circumstance in a defense based on provocation; the extenuating circumstance in a

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> If any person shall unlawfully shoot at any person, or shall in any manner unlawfully and maliciously attempt to discharge any loaded arms at any person, or shall *unlawfully and maliciously* stab, cut or wound any person, or shall assault or beat any person, with intent to maim, disfigure, or disable such person, or with intent to prevent the lawful apprehension or detainer of any party for any offense for which the said party may be legally apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender shall be guilty of a felony and, upon conviction are subject to imprisonment for not more than 15 years.

MD. ANN. CODE art. 27, § 386 (1992) (emphasis added). Except for minor amendments and a change in the maximum permitted sentence, the statute is substantially the same as when it was originally enacted in Chapter 99 of the Laws of 1853. *See* Hammond v. State, 322 Md. 451, 453, 588 A.2d 345, 345 (1991).

59. *Richmond*, 330 Md. at 229-30, 623 A.2d at 633. "There seems never to have been any doubt that the fourth type of assault, 'assault or beat any person,' had to be combined with one of the two alternative states of mind . . . to constitute an offense under the statute." *Id.* at 230, 623 A.2d at 633; *see also* State v. Elborn, 27 Md. 483, 488-89 (1867) (holding an indictment charging a defendant with "unlawfully shooting . . ." and "attempting maliciously and unlawfully to discharge a loaded pistol . . ." defective "in not averring in the language of the Act, that shooting was done with intent to maim, disfigure or disable").

60. *Richmond*, 330 Md. at 230-31, 623 A.2d at 633.

61. 328 Md. 95, 613 A.2d 379 (1992). The *Watkins* court subtly criticized its earlier decision in *State v. Faulkner*, stating: "In what may be a generous expansion of the law of self-defense, this Court has held that imperfect self-defense will serve to mitigate the offense of assault with intent to murder." *Watkins*, 328 Md. at 106 n.3, 613 A.2d at 384 n.3.

62. *Richmond*, 330 Md. at 231, 623 A.2d at 633-34.

63. *Id.*

64. *Id.*, 623 A.2d at 634.

65. *Id.*

66. *Id.* at 232, 623 A.2d at 634.

defense based on imperfect self-defense is the defendant's honest though unreasonable belief in the imminence of death or grave bodily injury.[67] In noting the defenses' similarities, the *Richmond* court also noted that provocation is not generally accepted as a mitigating circumstance in crimes other than murder.[68]

The court also pointed out that the concept of malice in the context of murder cases comprises two key elements: (1) the presence of the required malevolent state of mind, or the *mens rea* element, and (2) the absence of legally adequate justification, excuse, or mitigation.[69] In criminal cases not involving murder, the court asserted that the definition of malice does not require proof of the absence of mitigation.[70] In other words, "[t]he absence of mitigation is an element of malice only when the offense is one to which mitigation may apply . . . ."[71]

The court distinguished *People v. McKelvy*,[72] a California case that served as Richmond's principal authority for the proposition that a valid claim of imperfect self-defense will mitigate a nonhomicide crime to a lesser offense.[73] In *McKelvy*, the California Court of Appeals extended the imperfect self-defense rationale to the crime of mayhem.[74] Seeming to echo the *Faulkner* court, the *McKelvy* court ruled that a defendant's honestly held belief in the need for self-defense negated malice, thereby mitigating the offense.[75] In *Richmond*, however, the Court of Appeals took issue with the California court's definition of malice and indicated that the State's mayhem instruction, describing "maliciously" in its *mens rea* aspect only, was faulty.[76] The court observed that a defendant's honest though unreasonable belief in the need for self-defense is incompatible with the intent requirement for mayhem.[77] It concluded that a defense based on the absence of the requisite specific intent to commit a crime should not

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67. *See id.* (analogizing provocation to imperfect self-defense).

68. *Id.*

69. *Id.* at 231, 623 A.2d at 634; *see also* Ross v. State, 308 Md. 337, 340 n.1, 519 A.2d 735, 736 n.1 (1987).

70. *Richmond*, 330 Md. at 231, 623 A.2d at 634.

71. *Id.* at 232, 623 A.2d at 634.

72. 239 Cal. Rptr. 782 (Ct. App. 1987).

73. *Richmond*, 330 Md. at 233, 623 A.2d at 635.

74. *McKelvy*, 239 Cal. Rptr. at 786.

75. *Id.*

76. *Richmond*, 330 Md. at 233-34, 623 A.2d at 635 (quoting *McKelvy*, 239 Cal. Rptr. at 786) (defining malice in connection with a specific intent to "vex, injure or annoy").

77. *Id.* at 234.

be confused with the principle of mitigation.[78] The court therefore ruled out any argument that the *Faulkner* court implicitly accepted California's *mens rea* version of the honest but unreasonable belief standard.[79]

In another crucial distinction, the *Richmond* court reasoned that while a defendant may in fact intend the consequences of his act, he nevertheless may be entitled to mitigation because of the circumstance that induced him to act—the honest but unreasonable belief in the imminent danger of death or serious bodily injury.[80] Thus, the court determined that imperfect self-defense does not operate to negate the *mens rea* element of malice; rather, it negates the element of malice that demands that the killing occurred without mitigating circumstances.[81]

Persuaded that the absence of malice implied by the defense of imperfect self-defense is the lack of the necessary *mens rea* required for the crime of murder, Judge Bell dissented.[82] Unlike the majority, which focused on the unreasonableness of the defendant's belief as an extenuating circumstance, Judge Bell focused on the subjective dimension of imperfect self-defense.[83] He asserted that a defendant's honest belief in the existence of imminent peril fosters the subsequent exculpatory belief that his or her actions are either justified or excused.[84] Judge Bell deemed such a mental state inconsistent with the specific intent necessary to sustain a conviction for a crime requiring proof of malice and concluded that the doctrine of imperfect self-defense is not a mitigation defense.[85] Rather, "if the offense requires proof of malice, the negation of malice completely exonerates the defendant."[86]

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78. *Id.* The court explained that "[a] defendant may intend the exact result he brings about, but be entitled to mitigation because of the circumstances that caused him to act." *Id.*

79. In *Faulkner*, the Court of Appeals found that "a defendant's culpability for a homicide [is] mitigated when he lacks the requisite mens rea for the offense of murder." Faulkner v. State, 301 Md. 482, 490, 483 A.2d 759, 763 (1984).

80. *Richmond*, 330 Md. at 234, 623 A.2d at 635.

81. *Id.* at 233, 623 A.2d at 634.

82. *Id.* at 249, 623 A.2d at 643 (Bell, J., dissenting).

83. *Id.* at 255 n.8, 623 A.2d 646 n.8 (Bell, J., dissenting) ("[F]or the purposes of determining whether malice exists, the focus is on the honesty of the actor's perceived need to defend him or herself to the exclusion of any consideration of how the actor intends to accomplish that defense . . . .").

84. *Id.* at 255, 623 A.2d at 645-46 (Bell, J., dissenting).

85. *See id.* at 241, 623 A.2d at 638.

86. *Id.*

4. Analysis.—In *Richmond*, the Court of Appeals properly decided that the defense of imperfect self-defense does not operate to mitigate nonhomicide charges. In so doing, it made several noteworthy decisions regarding a doctrine that, while increasingly discussed among academics, has received comparatively little judicial scrutiny.[87]

Although the *Richmond* court's interpretation of section 386[88] supported its decision in the case, the ambiguity of the *Faulkner v. State* holding clearly necessitated a doctrinal justification for limiting imperfect self-defense to the mitigation of homicide crimes.[89] Confronted with *Faulkner*'s elementary rule that imperfect self-defense negates malice, Richmond's argument that the defense may be advanced to mitigate any crime requiring proof of malice was understandable. The critical point of law, however, is that "mitigation is a concept peculiar to criminal homicide cases."[90]

Other common law crimes that require proof of malice, such as malicious mischief and arson (malicious burning), employ the term as a generalized intent requirement and make no reference to mitigation.[91] In this respect, malicious wounding is no exception. In the case of murder, on the other hand, the term "malice" connotes intent coupled with the absence of justification, excuse, or mitigation.[92] Thus, imperfect self-defense negates malice in murder because the act, although intentional and without justification or excuse, was committed under the mitigating circumstance of an honest though unreasonable belief in the imminent danger of death or grievous bodily harm. Except in the crime of murder, the term "malice" connotes only a generalized mental state and the absence of justification or excuse, not mitigation.[93] Thus, the mitigation doctrine of imperfect self-defense cannot negate the element of malice in a malicious wounding charge.

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87. Imperfect self-defense is most frequently cited as a murder defense in connection with claims of Battered Woman's Syndrome. *See* Donald L. Creach, Note, *Partially Determined Imperfect Self Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982); Laurie J. Naylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679 (1986).

88. *See supra* notes 58-59 and accompanying text.

89. *See supra* notes 51-54 and accompanying text.

90. *Richmond*, 330 Md. at 231, 623 A.2d at 634.

91. *See* Shell v. State, 307 Md. 46, 66, 512 A.2d 358, 368 (1986) (holding that the term "maliciously" in a charge of willfully and maliciously destroying property "is descriptive of a wrongful act committed deliberately and without legal justification") (emphasis omitted) (citation omitted); Brown v. State, 285 Md. 469, 474, 403 A.2d 788, 791 (1979) (defining the term "malice" in an arson statute as intention or desire to harm another).

92. *See supra* note 69 and accompanying text; *see also* PERKINS & BOYCE, *supra* note 32, at 875.

93. *See supra* note 91 and accompanying text.

This decision eliminated any argument that imperfect self-defense mitigates nonhomicide crimes. The Court of Appeals may have intended to eliminate the defense bar's known propensity "to invoke this . . . doctrine with inappropriate and promiscuous frequency."[94] Thus, the opinion in *Richmond* substantially clarified the right to the defense of imperfect self-defense in Maryland.

5. Conclusion.—In *Richmond,* the Court of Appeals correctly characterized imperfect self-defense as a mitigation doctrine historically and analytically inseparable from criminal homicide. In so doing, the *Richmond* court established a bright line rule that, while selectively upholding an exception for murder, prudently retains the reasonableness standard for self-defense in all other cases.

CHRISTIAN C. MAHLER

C. Loitering with the Intent to Sell Drugs

In *Powers v. State,*[1] the Court of Appeals analyzed a Baltimore City ordinance that criminalizes loitering in a drug-free zone with the intent to engage in drug-related activities.[2] In a case of first impression, the court strictly construed the law to determine what circumstances constitute probable cause to arrest a person for a violation of the ordinance. In short, it concluded that probable cause exists only when the arresting officer has reason to believe the suspect is loitering in the drug-free zone specifically for the purpose of participating in drug-related activity.[3] Once probable cause is established, the officer must issue the suspect a warning prior to making any arrest.[4]

In limiting its review to the elements of the crime and the procedural aspects of the arrest, the court avoided addressing the constitutionality of the ordinance.[5] Like similar laws across the country,[6] the Baltimore City ordinance is vulnerable to attack on constitutional grounds.[7] In fact, the Court of Appeals appeared to be clarifying the law in order to entertain such an attack in the future.

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94. Cunningham v. State, 58 Md. App. 249, 253, 473 A.2d 40, 42, *cert. denied,* 300 Md. 316, 477 A.2d 1195 (1984).

1. 329 Md. 321, 619 A.2d 538 (1993).

2. BALTIMORE CITY, MD., CODE art. 19, § 58C(c)(1)-(7) (1983 & Supp. 1992).

3. *Powers,* 329 Md. at 333-34, 619 A.2d at 544.

4. *Id.*

5. *Id.* at 325-26, 619 A.2d at 540-41.

6. *See infra* note 35.

7. The maximum penalties for the offense are 30 days in jail and a $400 fine. BALTIMORE CITY, MD., CODE art. 19, § 58C(f). Because these relatively minor penalties are typi-

1. The Case.—On May 24, 1991, at approximately 4:30 p.m., Baltimore City Police Officer Laura Deuerling observed Earl Powers standing among a group of people on a street corner in a certified drug-free zone in Baltimore City.[8] Deuerling recognized Powers from previous occasions and "from information about him received from fellow police officers."[9] She was aware that he had been convicted of narcotics violations.[10]

Deuerling approached Powers and requested his name, address, and purpose for being in the area.[11] Powers claimed to be visiting a woman whose name Officer Deuerling did not recognize as someone who lived in the area.[12] Moreover, the address Powers gave was not within the drug-free zone.[13] Officer Deuerling did not further investigate the validity of Powers's reasons for being in the drug-free zone, but did not believe his explanation.[14] She then issued Powers a warning for loitering in a drug-free zone and ordered him to leave.[15] Powers proceeded to "move on" and was not arrested.[16]

Four hours later Officer Deuerling again encountered Powers, roughly forty-eight feet from the street corner where he had been that afternoon, again within the drug-free zone.[17] Powers was talking with a group of people, some of whom Deuerling had arrested on previous occasions for narcotics violations.[18] Deuerling observed Powers place a large roll of money in his pocket.[19] The persons with whom he was speaking fled upon seeing Deuerling.[20] Based on these observations

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cally disposed of in plea bargaining, these cases rarely progress to trial where the issue of the ordinance's constitutionality can be raised.

8. *Powers*, 329 Md. at 327, 619 A.2d at 541. The Police Commissioner may designate a given geographical area of Baltimore City as a "drug-free zone." BALTIMORE CITY, MD., CODE art. 19, § 58C(e). In determining which areas to designate as "drug free-zones," the commissioner may consider (1) arrest rates or other statistics which indicate a "disproportionately high occurrence" of drug-related activity in an area, (2) a homicide or multiple violent crimes in the area linked to drug activity, and (3) "reliable, objective and verifiable information" concerning illegal drug activity in an area. *Id.* § 58C(e)(2). The Commissioner may also rely on "any other verifiable information" that indicates a drug-related health or safety hazard in an area. *Id.*

9. *Powers*, 329 Md. at 327, 619 A.2d at 541.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 332, 619 A.2d at 544.

18. *Id.*

19. *Id.*

20. *Id.* at 332-33, 619 A.2d at 544.

and her earlier warning to him, Deuerling arrested Powers.[21] In the search incident to his arrest, she seized $70, nineteen bags of heroin, and seven small bags of crack cocaine.[22]

Powers was tried without a jury in the Circuit Court for Baltimore City and convicted of loitering in a drug-free zone for drug-related purposes and of possession of cocaine and heroin with the intent to distribute.[23] Before the Court of Special Appeals could hear his appeal, the Court of Appeals certified the case on its own motion.[24] It reversed Powers's conviction and remanded the case for a new trial.[25]

2. Legal Background.—The Baltimore City Council enacted Article 19, section 58C, of the Baltimore City Code in 1989.[26] The ordinance is aimed at halting the spread of illegal drug activity and the violent crime that accompanies it.[27] It states that it is "unlawful for any person to loiter about or remain at any public way, public place or place open or legally accessible to the public within a certified drug free zone . . . for the purpose of engaging in drug-related activity."[28] The city council found that making such loitering a criminal act was a "necessary exercise of the police power to maintain the peace, good government, health and welfare of Baltimore City."[29]

The ordinance outlines the procedure for making an arrest. It states that "the totality of the circumstances involved shall be considered"[30] and lists specific circumstances that may contribute to a determination of whether a suspect has manifested the requisite intent to

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21. *Id.* at 333, 619 A.2d at 544.

22. *Id.*

23. *Id.* at 323, 619 A.2d at 539. Two criminal informations were filed against Powers. One was for loitering in a drug-free zone for the purpose of engaging in drug-related activity. *Id.* The second included the following four crimes: (1) possession of cocaine with the intent to distribute, (2) simple possession of cocaine, (3) possession of heroin with intent to distribute, and (4) simple possession of heroin. *Id.* Powers was convicted of the charge in the first information and of the first and third charges in the second. *Id.* Prior to the trial, Powers filed a motion to dismiss, challenging the constitutionality of the ordinance, and a motion to suppress the evidence seized incident to his arrest on the grounds that his arrest was illegal. *Id.* The trial judge denied both motions. *Id.* at 325, 619 A.2d at 540.

24. *Id.* at 323, 619 A.2d at 539.

25. *Id.* at 335, 619 A.2d at 545.

26. *See id.* at 324, 619 A.2d at 539-40.

27. BALTIMORE CITY, MD., CODE art. 19, § 58C(a); *see also Powers*, 329 Md. at 324 n.2, 619 A.2d at 540 n.2.

28. BALTIMORE CITY, MD., CODE art. 19, § 58C(b). Violation of the ordinance is a misdemeanor; it carries a penalty of 30 days in jail, a $400 fine, or both. *Id.* § 58C(f).

29. *Id.*

30. *Id.* § 58C(c).

engage in drug-related activity.[31] Upon such a manifestation, the police officer who suspects a person of violating the law is required to ask the suspect to leave the area.[32] Only upon refusal may the suspect be arrested.[33]

Because of the newness of the ordinance and the relatively minor penalties imposed for its violation, the *Powers* decision was the first in-depth discussion of the law by a Maryland court.[34] Although the court avoided the issue of the ordinance's constitutionality, other tribunals

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31. *Id.* The seven circumstances are:

(1) The conduct of the person being observed, including, by way of example only, that such person is behaving in a manner raising a reasonable belief that the person is engaging or is about to engage in illegal drug activity such as the observable distribution of small packages to other persons, the receipt of currency for the exchange of small packages, operating as a "lookout", warning others of the arrival of police, fleeing without other apparent reason upon the appearance of a police officer, concealing himself or herself or any object which reasonably may be connected to unlawful drug-related activity, or engaging in any other conduct normally associated by law enforcement agencies with the illegal distribution or possession of drugs;

(2) Information from a reliable source indicating that the person being observed routinely distributes illegal drugs within the drug free zone;

(3) Information from a reliable source indicating that the person being observed is currently engaging in illegal drug-related activity within the drug free zone;

(4) Such person is physically identified by the officer as a member of a "gang" or association which engages in illegal drug activity;

(5) Such person is a known unlawful drug user, possessor, or seller. A "known unlawful drug user, possessor, or seller" is a person who has, within the knowledge of the arresting officer, been convicted in any court of any violation of a referenced provision of the referenced state code involving the regulation, use, possession, purchase, or sale of any of the substances referred to therein, or convicted of violating a substantially similar provision of the federal law or such law of any other jurisdiction; or a person who displays physical characteristics of drug intoxication or usage, such as dilated pupils, glassy eyes, or "needle tracks"; or a person who possesses drug paraphernalia as defined in Section 287a of Article 27 of the referenced Annotated Code of Maryland;

(6) Such person has no other apparent lawful reason for loitering or remaining in the drug free zone (e.g., such as waiting for a bus or being near one's own residence);

(7) Any vehicle involved in the observed circumstances is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding arrest warrant for a crime involving drug-related activity.

Id.

32. *Id.* § 58C(d).

33. *Id.*

34. Although the constitutionality of the ordinance was challenged by the appellant in Guy v. State, 91 Md. App. 600, 605 A.2d 642, *cert. denied*, 327 Md. 627, 612 A.2d 257 (1992), the Court of Special Appeals decided the case on other grounds. The court "express[ed] no opinion on appellant's challenge to the constitutionality of the Baltimore City anti-loitering ordinance." *Id.* at 614, 605 A.2d at 649.

have considered the question with regard to similar laws[35] that prohibit activities such as prostitution[36] and general vagrancy.[37] For example, in *Papachristou v. City of Jacksonville*,[38] the Supreme Court addressed the constitutionality of a general vagrancy law prohibiting loitering.[39] The Court first held that loitering is a constitutionally protected activity[40] and noted that it considered the "unwritten amenities"[41] at issue in the case basically innocent acts that the law in question made criminal.[42] The Court held that because the law did not give a potential offender notice that his conduct was criminal, it was unconstitutionally vague.[43] The Court has not, however, heard a case challenging a law prohibiting loitering with the intent to engage in drug-related activity.

State and federal courts that have heard constitutional attacks on laws like the Baltimore City ordinance universally have focused on the doctrines of overbreadth and vagueness.[44] Under the vagueness doc-

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35. *See, e.g.*, Rene M. LaForte, *The Constitutional Implications of Anti-Drug Loitering Ordinances in Ohio*, 18 U. DAYTON L. REV. 423 (1993) (discussing antidrug loitering ordinances in Seattle, Dayton, Akron, and Cleveland); William Trosch, *The Third Generation of Loitering Laws Goes to Court: Do Laws That Criminalize "Loitering with the Intent to Sell Drugs" Pass Constitutional Muster?*, 71 N.C. L. REV. 513 (1993) (discussing antidrug loitering ordinances in Charlotte, Fayetteville, Greensboro, and High Point, North Carolina); *see also* Lisa A. Kainec, Comment, *Curbing Gang Related Violence in America: Do Gang Members Have a Constitutional Right to Loiter on Our Streets?*, 43 CASE W. RES. L. REV. 651 (1993) (discussing ordinances allowing police to force persons reasonably believed to be members of a gang to disperse if loitering).

36. *See* New York v. Uplinger, 467 U.S. 246 (1984) (per curiam) (rescinding certiorari and allowing the New York Court of Appeals's decision, which held that a statute broadly prohibiting loitering for the purpose of engaging or soliciting prostitution was unconstitutional, to stand).

37. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 n.1 (1972) (voiding the statute for vagueness because the law did not give notice to the potential offender of the activity that was criminal and created an opportunity for its arbitrary and discriminatory enforcement).

38. 405 U.S. 156 (1972).

39. *See id.* at 160-62.

40. *Id.* at 162-65. The Court stated that loafing and loitering are "historically part of the amenities of life as we have known them." *Id.* at 164.

41. *Id.*

42. *Id.* at 163.

43. *Id.* at 166.

44. *See, e.g.*, American Civil Liberties Union v. City of Alexandria, 747 F. Supp. 324 (E.D. Va. 1990) (invalidating a loitering with the intent to sell drugs ordinance for overbreadth); City of Pompano Beach v. Wright, 28 Fla. Supp. 2d 114 (1988) (striking down a loitering with the intent to sell drugs ordinance for overbreadth, vagueness, and violation of the Fourth Amendment). *But see* People v. Goodwin, 519 N.Y.S.2d 189 (N.Y. Dist. Ct. 1987) (holding that an antidrug loitering law is constitutional when ascertainable standards are specified); City of Akron v. Holley, 557 N.E.2d 861 (Ohio Mun. Ct. 1989) (finding an ordinance banning loitering with unlawful, drug-related intent constitutionally valid if clear and specific standards for police action are set).

trine, a law must give notice of the prohibition of particular conduct and must not encourage arbitrary or discriminatory enforcement.[45] The overbreadth doctrine, although very narrow,[46] guards against laws that place within the zone of criminal conduct a substantial amount of constitutionally protected activity.[47]

Laws such as the Baltimore City ordinance first appeared in Yakima, Washington,[48] after the Washington Supreme Court's decision in *Seattle v. Drew*.[49] In *Drew*, the court struck down a Seattle law criminalizing loitering under "suspicious circumstances" without a "satisfactory" reason.[50] Although the court found the law in question unconstitutionally vague,[51] it articulated the requirements for a constitutionally valid antiloitering law[52] by endorsing the proposed official draft of the *Model Penal Code*.[53]

More recently, the United States District Court for the Eastern District of Virginia struck down an Alexandria City ordinance similar

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45. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

46. *See* New York State Club Ass'n v. City of New York, 487 U.S. 1, 14 (1988) (applying the doctrine of overbreadth narrowly).

47. City of Houston v. Hill, 482 U.S. 451, 458 (1987) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)).

48. For a thorough discussion of the origins of such ordinances, see LaForte, *supra* note 35, at 424.

49. 423 P.2d 522 (Wash. 1967).

50. *Id.* at 523-24.

51. *Id.* at 525.

52. *Id.* at 525-26. After *Drew*, Seattle drafted laws criminalizing loitering for the purpose of prostitution following the guidelines set forth in *Drew*. Laforte, *supra* note 35, at 425-26. The revised statutes were upheld in City of Seattle v. Jones, 488 P.2d 750 (Wash. 1971).

53. *Drew*, 423 P.2d at 526 (citing MODEL PENAL CODE § 250.6 (1962)). The proposed official draft states:

> A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

MODEL PENAL CODE § 250.6. The *Model Penal Code* appears to have been the model for the Baltimore City ordinance.

to the Baltimore City ordinance.[54] The district court found the ordinance overbroad in that "protected expression may be thwarted as individuals abstain from socializing, counseling, organizing community events, or registering to vote out of fear of prosecution under the facially overbroad ordinance."[55] Other courts, however, have upheld similar ordinances relying on the fact that they require criminal intent and therefore do not punish innocent acts.[56]

3. The Court's Reasoning.—Recognizing that a record number of murders were committed in Baltimore City in 1992, the *Powers* court first opined that the concern of the Baltimore City Council in creating the ordinance was well founded.[57] With this in mind, the court embarked on a detailed analysis of the ordinance to determine the legality of Powers's arrest.[58]

Focusing on the testimony of Officer Deuerling, the court applied the requirements of the ordinance to the facts of the first encounter between Deuerling and Powers.[59] The elements of the offense, which the court took directly from the ordinance, include: "(1) loitering or remaining (2) at any public way, public place, or place open or legally accessible to the public (3) within a certified drug free zone (4) for the purpose of engaging in drug-related activity prohibited by the Maryland Controlled Dangerous Substances Law."[60] Assuming the existence of the first three elements of the crime, the court declared the issue to be "whether the evidence was sufficient to satisfy the fourth element requiring a specific intent."[61]

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54. American Civil Liberties Union v. City of Alexandria, 747 F. Supp. 324 (E.D. Va. 1990).

55. *Id.* at 328.

56. *See* City of Akron v. Holley, 557 N.E.2d 861, 865 (Ohio Mun. Ct. 1989) (upholding Akron's antidrug loitering ordinance).

57. *Powers*, 329 Md. at 324 n.2, 619 A.2d at 540 n.2.

58. *Id.* at 326, 619 A.2d at 541.

59. *Id.* at 326-27, 619 A.2d at 541-42; *see supra* notes 8-16 and accompanying text.

60. *Powers*, 329 Md. at 328, 619 A.2d at 541-42. In defining "loitering," the court adopted the common use of the terms it had discussed in Molinari v. State, 217 Md. 282, 142 A.2d 583 (1958). *Powers*, 329 Md. at 328 n.3, 619 A.2d 541-42 n.3. The court in *Molinari* stated that "[p]erhaps the most satisfactory equivalent of [the] terms ['loafing' and 'loitering'] . . . is the colloquial expression 'hanging around.'" *Molinari*, 217 Md. at 286, 142 A.2d at 586.

The Maryland Controlled Dangerous Substances Law appears at MD. ANN. CODE art. 27, § 276 (1957).

61. *Powers*, 329 Md. at 328, 619 A.2d at 542.

The court looked to section 58C(c)[62] for guidance in determining whether under the guidelines of the ordinance,[63] the facts surrounding the first encounter would support the existence of the requisite intent. After carefully analyzing each of the seven circumstances listed in the ordinance,[64] the court decided that upon objective observation, the defendant's conduct was innocent.[65]

Moreover, Officer Deuerling's failure to factually refute the defendant's explanation for his being in the drug-free zone required the court to assume his assertions were true when made.[66] Thus, the court concluded that Officer Deuerling lacked probable cause in the first encounter to suspect the defendant of loitering in the drug-free zone "for the purpose of engaging in prohibited drug-related activity."[67] Consequently, the officer's request for Powers to leave the area at that time "had no legal significance whatsoever in the contemplation of the ordinance; there was no proper basis justifying the request."[68]

In reviewing the facts of the second encounter between Deuerling and Powers, the court assumed that the circumstances "sufficiently evidenced an intent on the part of Powers to engage in drug-related activity."[69] Officer Deuerling therefore had adequate probable cause to request Powers to leave.[70] Arresting Powers prior to the issuance of a valid warning, however, was improper.[71] Even if the officer had the authority to make an arrest under general law,[72] the

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62. BALTIMORE CITY, MD., CODE art. 19, § 58C(c); *see supra* note 31.

63. *Powers*, 329 Md. at 328, 619 A.2d at 542.

64. *Id.* at 329-31, 619 A.2d at 542-43; *see supra* note 31 (quoting the ordinance).

65. *Powers*, 329 Md. at 331, 619 A.2d at 543.

66. *Id.* The court seemed to be particularly swayed by this factor. It pointed out that "[Powers] said that he was there to visit a girl, and the officer made no attempt to disprove this," *id.* at 329, 619 A.2d at 542, and declared that "[i]t was obvious that [Officer Deuerling] simply did not believe that Powers was in the area to visit a girl, but she did not press him on the matter or investigate him further." *Id.* at 327, 619 A.2d at 541. Had the officer further investigated the defendant's story and found him to be lying, the court may have been satisfied that probable cause existed to believe he was violating the ordinance. If a person has no other apparent or lawful reason for being in the area and loitering, probable cause may exist that he or she is violating the ordinance. BALTIMORE CITY, MD., CODE art. 19, § 58C(c)(6).

67. *Powers*, 329 Md. at 331, 619 A.2d at 543.

68. *Id.* at 332, 619 A.2d at 544.

69. *Id.* at 333, 619 A.2d at 544.

70. *Id.* at 334, 619 A.2d at 544.

71. *Id.*

72. A police officer may make an arrest without a warrant if the officer has probable cause to believe a misdemeanor has been committed in his or her presence or view. MD. ANN. CODE art. 27, § 594B(b) (1992). Sections 594B(e)(1) and (f)(x) allow for arrest upon

court noted that the ordinance intervened to require that an arrest under it be "subject to a refusal of a request to leave."[73]

The illegality of the arrest made the subsequent search of Powers, and the seizure incident to that search, violative of the Fourth Amendment of the United States Constitution.[74] Thus, the court held that the evidence obtained in the search and seizure, which resulted in Powers's conviction, was improperly admitted at the trial.[75] The Court of Appeals reversed the judgment of the Circuit Court of Baltimore City and remanded the case for a new trial.[76]

4. Analysis.—The Court of Appeals's decision in *Powers* is the first analysis by a Maryland court of a loitering in a drug-free zone law. In *Powers,* the court clarified the meaning of loitering in a drug-free zone for the purpose of engaging in drug-related activity and set forth the procedural requirements for arrest under the ordinance. In addition, the decision may serve as a guideline for determining guilt and innocence under the ordinance.

In order to arrest a person for loitering in a drug-free zone for the purpose of engaging in drug-related activity, a police officer must (1) have probable cause that the suspect is loitering for the specific purpose of engaging in drug-related activity and (2) issue a request to the suspect to leave the area.[77] Only if the suspect fails to leave the area may he be arrested.[78]

Although the constitutionality of the ordinance was questioned, the Court of Appeals declined to rule on the issue.[79] Following the general practice of not ruling on the constitutionality of a law if the

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probable cause that a person has violated the Controlled Dangerous Substances Law of Maryland. *Id.* § 594B(e)(1), (f)(x).

73. *Powers,* 329 Md. at 333 n.4, 619 A.2d at 544 n.4. The arrest in question was illegal under the ordinance, and according to the court, would have been illegal under general law as well. "It is certain that Officer Deuerling had no probable cause to believe that Powers was violating the Controlled Dangerous Substances Law." *Id.*

74. *Id.* at 334, 619 A.2d at 545. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

75. *Powers,* 329 Md. at 334, 619 A.2d at 545. Evidence obtained as a result of an unconstitutional search and seizure is inadmissible in a state criminal prosecution. Mapp v. Ohio, 367 U.S. 643 (1961).

76. *Powers,* 329 Md. at 335, 619 A.2d at 545. This amounts to a dismissal of the charges, because without the excluded evidence, there is no case against Powers.

77. *Powers,* 329 Md. at 331, 619 A.2d at 543.

78. *Id.*

79. *Id.* at 325-26, 619 A.2d at 540-41.

case can be decided on a nonconstitutional basis,[80] the court instead focused on whether the officer's conduct comported with the law.[81] Because the court found Powers's arrest illegal, addressing the constitutionality of the ordinance was unnecessary. The court instead clarified the terms of the ordinance and set the stage for future attacks on its constitutionality.[82]

It is difficult to speculate whether, in a future case in which the constitutionality of the ordinance is properly at issue, the court will uphold the ordinance as a valid law. Courts that have upheld such ordinances have pointed to the specific conduct that is made illegal—the intent to engage in unlawful, drug-related activity.[83] Courts that have struck down such ordinances have focused on the fact that they may make innocent acts illegal.[84] The *Powers* court clarified the prima facie requirements of the ordinance so courts can, in the future, focus directly on the law's constitutionality, but gave no hint as to how it would rule on the issue.

5. Conclusion.—In *Powers,* the court analyzed the elements of loitering in a drug-free zone for the purpose of engaging in drug-related activity.[85] An arresting officer must find probable cause that a person is loitering "for the purpose of engaging in drug-related activity," and then must request that the suspect leave the drug-free zone.[86] Only after these two requirements are met is a person subject to arrest upon refusal to comply with the officer's request to leave.[87] This decision clarifies the elements of the crime and paves the way for future evaluation of the law on the question of its constitutionality.

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80. *Id.* at 325-26, 619 A.2d at 540-41; *see also* DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988).

81. *See Powers,* 329 Md. at 325-26, 619 A.2d at 543 (citing Brittingham v. State, 306 Md. 654, 658, 511 A.2d 45, 48 (1986)).

82. The court left an open invitation for a constitutional challenge, stating "[w]e leave that to another day and another case." *Id.* at 326, 619 A.2d at 541.

83. *See supra* note 56.

84. *See supra* text accompanying notes 54-55.

85. *Powers,* 329 Md. at 327-28, 619 A.2d at 541-42.

86. *Id.* at 331, 619 A.2d at 543.

87. *Id.*

D. Reassessing the Preferred Explanation of the "Reasonable Doubt" Standard

In *Wills v. State*,[1] the Court of Appeals held that an explanation of the "reasonable doubt" standard, which suggested that a "nagging doubt" in the minds of the jurors was insufficient to constitute a reasonable doubt, was erroneous when considering the instruction as a whole.[2] In assessing the probable impact of the erroneous instruction, the court noted that the outcome of the case was dependent upon the jury's evaluation of conflicting testimony.[3] Applying the standard for harmless error adopted in *Dorsey v. State*,[4] the court reversed the conviction because it could not "say, without reservation, that the erroneous instruction did not contribute to the jury's guilty verdicts."[5]

While the court reaffirmed its reluctance to prescribe a mandatory explanation of the reasonable doubt standard applicable in all cases, the court opted to establish guidelines to assist courts in explaining the standard.[6] In outlining an acceptable jury charge, the court conceded that a portion of the explanation it had endorsed for almost half a century[7] may tend to confuse juries.[8] As an alternative, the court strongly endorsed substitute language found in the *Maryland Criminal Pattern Jury Instructions*.[9]

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1. 329 Md. 370, 620 A.2d 295 (1993).

2. *Id.* at 388, 620 A.2d at 303.

3. *Id.*

4. 276 Md. 638, 350 A.2d 665 (1976). The *Dorsey* court held that reversal of a conviction is required if an appellant in a criminal case establishes error, and a reviewing court is unable to "declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Id.* at 659, 350 A.2d at 678. After the *Wills* decision, however, the Supreme Court, in Sullivan v. Louisiana, 113 S. Ct. 2078, 2082-83 (1993), held that an erroneous explanation of the reasonable doubt standard deprives a defendant of the Sixth Amendment right to a trial by jury and can never be harmless error.

5. *Wills*, 329 Md. at 388, 620 A.2d at 304.

6. *See id.* at 382-83, 620 A.2d at 301.

7. In Lambert v. State, 193 Md. 551, 69 A.2d 461 (1949), the Court of Appeals held that "it is not erroneous to instruct the jury that evidence is sufficient to remove a reasonable doubt when it convinces the judgment of an ordinarily prudent man of the truth of a proposition with such force that he would act upon that conviction without hesitation in his important affairs." *Id.* at 560-61, 69 A.2d at 465. The court has cited *Lambert* with approval in a long line of cases. *See, e.g.*, Poole v. State, 295 Md. 167, 453 A.2d 1218 (1983); Montgomery v. State, 292 Md. 84, 437 A.2d 654 (1981); Lansdowne v. State, 287 Md. 232, 412 A.2d 88 (1980).

8. *Wills*, 329 Md. at 383, 620 A.2d at 301.

9. *See id.* at 383-84, 620 A.2d at 301-02 (citing MARYLAND PATTERN JURY INSTRUCTIONS—CRIMINAL 2:02 (1991) [hereinafter MPJI-Cr]).

1. The Case.—On June 15, 1988, William Winters, a detective in the Charles County Sheriff's Department, drove to Andrew Nathaniel Wills's trailer in Malcolm, Maryland, as part of an on-going police investigation.[10] Winters was accompanied by two police informants, Deanna Carmody and Elizabeth Butler.[11] Upon arriving at Wills's trailer, Carmody got out of the car and approached Wills.[12]

At trial, Detective Winters testified that, after a conversation between Wills and Carmody, Wills approached Winters who said, "Three. Right."[13] Wills then allegedly replied, "I can get it for you."[14] Winters testified that Wills then beckoned Larry Braswell, who produced some plastic bags from his pocket and offered them to Winters, who pocketed them.[15] Winters stated that the bags appeared to contain three forty-dollar rocks of crack cocaine.[16] Winters testified that he gave Braswell $120; Braswell gave the money to Wills, which Wills then counted and pocketed.[17] Subsequent forensic chemistry tests indicated that the substance turned in by Winters was cocaine.[18]

In Wills's version of the event, Carmody asked him if she could purchase three bags of crack cocaine,[19] but he told her that he did not sell crack and then walked away from her.[20] Wills attested that he knew of Carmody's involvement with the police and that he knew she was at his trailer that day as part of a police investigation.[21] A witness corroborated this point by testifying that Carmody told him that the police wanted to arrest Wills for selling drugs and that he had related this information to Wills.[22] Neither Carmody nor Butler could be located to testify at trial.[23]

A jury in the Circuit Court for Charles County convicted Wills of distributing and conspiring to distribute cocaine.[24] On appeal to the Court of Special Appeals, Wills raised three issues for consideration.

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10. Brief and Appendix of Petitioner at 2. The parties stipulated to the statement of facts in petitioner's brief. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 2-3.

16. *Id.* at 3.

17. *Id.*

18. *Id.*

19. *Id.* at 4.

20. *Id.*

21. *Id.*

22. *Id.* at 3.

23. Wills v. State, No. 91-1123, slip op. at 2 (Md. Ct. Spec. App. June 11, 1992) (per curiam), *rev'd*, 329 Md. 370, 620 A.2d 295 (1993).

24. *Wills*, 329 Md. at 385, 620 A.2d at 302.

First, Wills contended that the trial court should have granted his motion for a continuance in light of the unavailability of Butler and Carmody to testify.[25] Second, Wills alleged that the trial court erred by failing to give a missing witness instruction.[26] Finally, Wills asserted that the trial court erroneously instructed the jury on the reasonable doubt standard by implying that the existence of a "nagging doubt" was insufficient to constitute a reasonable doubt.[27] The Court of Special Appeals found Wills's claims to be without merit and affirmed the judgment of the lower court.[28] The Court of Appeals granted certiorari to consider the adequacy of the trial court's jury charge on the reasonable doubt standard.[29]

2. Legal Background.—Through a series of opinions, the Court of Appeals has developed a significant body of case law regarding the reasonable doubt standard.[30] As a result of these decisions, Maryland's requirements for explaining the standard exceed those mandated by the United States Constitution.[31] Maryland law on the subject, nevertheless, may be profitably viewed through the constitutional constraints articulated by the Supreme Court.

a. Constitutional Overlay.—The Supreme Court has held that the Due Process Clause[32] "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[33] Accordingly, in a criminal case, the failure of the trial court to instruct the jury on the requirement that the State prove the defendant's guilt beyond a reasonable doubt requires automatic reversal.[34] Despite the "vital role in the American scheme of criminal procedure" played by the reasonable doubt standard,[35] the Court has never declared that the Constitution requires judges to give jury instructions explaining the standard.[36]

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25. *Wills*, slip op. at 2.
26. *Id.* at 3-5.
27. *Id.* at 6-7.
28. *Id.* at 7.
29. *Wills*, 329 Md. at 385, 620 A.2d at 302.
30. *See infra* notes 65-77 and accompanying text.
31. *See id.*
32. U.S. CONST. amend. XIV.
33. *In re* Winship, 397 U.S. 358, 364 (1970).
34. *See* Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979).
35. *Winship*, 397 U.S. at 363.
36. *See* Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, 1716-17 (1990).

The Court has, however, established rules for reviewing challenged instructions. When the Court evaluates a jury instruction for constitutional sufficiency, it has made clear that the challenged language must be evaluated "in the context of the charge as a whole."[37] The Court has explained that, while some parts of a charge may be "infirm" in isolation, the rest of the instruction may remedy any unconstitutional inference that might have relieved the state of its burden of persuasion.[38] Furthermore, when the Court reviews an ambiguous instruction which is neither "concededly erroneous, nor found so by a court,"[39] it has focused on "'whether there [was] a *reasonable likelihood* that the jury . . . applied the challenged instruction in a way' that violate[d] the Constitution."[40]

The utility and even the desirability of explaining the reasonable doubt standard has been the subject of some dispute.[41] Despite its reservations, the Supreme Court has cited with approval some at-

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37. Francis v. Franklin, 471 U.S. 307, 315 (1985).

38. *See id.*

39. Boyde v. California, 494 U.S. 370, 380 (1990).

40. Estelle v. McGuire, 112 S. Ct. 475, 482 (1991) (quoting *Boyde*, 494 U.S. at 380) (emphasis added). In *Estelle*, the Court clarified the standard of review with regard to jury instructions by adopting the "reasonable likelihood" standard announced in *Boyde*. *Id.* at 482 n.4. The Court discussed and rejected several prior formulations that considered how a reasonable juror "could" or "would" have interpreted the charge. *Id.* For example, the Court rejected a standard which looked to "'how reasonable jurors could have understood the charge as a whole.'" *Id.* (quoting Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam)). In explaining the "reasonable likelihood" standard, the *Boyde* Court indicated that a greater showing is required than what a "single hypothetical 'reasonable' juror" might possibly have done, but the standard does not require a showing that "the jury was more likely than not to have been impermissibly inhibited by the instruction." *Boyde*, 494 U.S. at 380.

While the instruction in *Boyde* concerned a capital sentencing proceeding, subsequent decisions have indicated that this standard applies to all reasonable doubt instructions. *See Estelle*, 112 S. Ct. at 482 n.4 (comparing the "reasonable likelihood" standard to the *Cage* standard); Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 n.1 (1993) (suggesting that the *Boyde* standard would have been used to evaluate the reasonable doubt instruction but for the narrow question presented in the case and the State's failure to raise the issue in prior proceedings).

41. *See* Diamond, *supra* note 36, at 1717-21. Diamond notes that some courts base their refusal to explain the standard on dictum in Holland v. United States, 348 U.S. 121 (1954). *Id.* at 1724. In *Holland*, the Court upheld a trial court's explanation of the standard, but noted that "'[a]ttempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury.'" *Holland*, 348 U.S. at 140 (quoting Miles v. United States, 103 U.S. 304, 312 (1880)).

Citing this language from *Holland*, the Court of Appeals for the Fourth Circuit has "join[ed] in the general condemnation of trial court attempts to define reasonable doubt," and has strongly stated that "[d]istrict courts are again admonished not to define reasonable doubt in their jury instructions." United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985).

tempts by trial courts to explain the standard.[42] For example, in *Holland v. United States*,[43] the Court upheld a jury instruction explaining reasonable doubt as "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon."[44] While upholding the instruction, the Court stated that "this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act."[45] This "hesitate to act" formulation has received considerable support in the federal circuits, and to a lesser degree, in state courts.[46]

In addition to endorsing some instructions as adequate explanations of the reasonable doubt standard, the Supreme Court also has held that some explanations do not comply with the due process standard announced in *In re Winship*[47] and, therefore, require reversal. For example, in *Cage v. Louisiana*,[48] the Court held that the trial court's explanation of the reasonable doubt standard could have been interpreted "to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause."[49] In evaluating the instruction in *Cage*, the Court isolated a portion of the charge that equated a reasonable doubt with "a 'grave uncertainty' and an 'actual substantial doubt,'"[50] and held that this language, when read in connection with a reference to a "'moral certainty,' rather than evidentiary certainty" was constitutionally infirm.[51]

At the time *Wills* was decided, the Court had not passed on the question of whether an erroneous instruction on the reasonable doubt standard could ever be considered harmless error. The Court resolved this question in *Sullivan v. Louisiana*,[52] when it held that a constitutionally deficient instruction on the reasonable doubt standard deprives a defendant of a jury verdict as contemplated by the

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42. *See, e.g., Miles*, 103 U.S. at 312; Jackson v. Virginia, 443 U.S. 307, 317 n.9 (1979) (citing the *Holland* Court's discussion of different formulations of the standard).

43. 348 U.S. 121 (1954).

44. *Id.* at 140.

45. *Id.* (citation omitted).

46. *See* Jacquelyn L. Bain, Comment, *A Proposed Definition of Reasonable Doubt and the Demise of the Circumstantial Evidence Charge Following* Hankins v. State, 15 ST. MARY'S L.J. 353, 368 (1984). For a discussion of the various explanations of the standard used in federal and state courts, see 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 14 (14th ed. 1985).

47. 397 U.S. 358 (1970); *see supra* text accompanying note 33.

48. 498 U.S. 39 (1990) (per curiam).

49. *Id.* at 41.

50. *Id.*

51. *Id.*

52. 113 S. Ct. 2078 (1993).

Sixth Amendment.[53] Thus, the Court concluded that reversal must be automatic and an erroneous instruction on reasonable doubt is not subject to harmless error analysis.[54] It determined that a constitutionally defective instruction on reasonable doubt "vitiates *all* of the jury's findings"[55] and "cannot be harmless regardless of how overwhelming the evidence of [the defendant's] guilt."[56]

b. Maryland Law.—Recognizing that lay juries may not fully appreciate the often subtle distinctions implicit in legal standards, Maryland has adopted rule 4-325,[57] which governs jury instructions. Section (c) of the rule generally allows courts, at their discretion, to instruct juries regarding the applicable law.[58] A court *must*, however, instruct the jury upon the request of a party, unless the matter in the requested instruction has already been covered in the instructions given.[59] When a court fails upon request to instruct the jury on the presumption of innocence, the Court of Appeals has held the omission erroneous.[60] Additionally, a trial court commits error when it refuses to instruct the jury either on the binding effect of the judge's instruction on the State's burden of proving guilt beyond a reasonable doubt[61] or on the meaning of the reasonable doubt standard.[62]

While the Court of Appeals has affirmed the utility and desirability of explaining the reasonable doubt standard to the jury,[63] it has

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53. *Id.* at 2081-82.

54. *Id.*

55. *Id.* at 2082.

56. *Id.* at 2083 (Rehnquist, C.J., concurring).

57. MD. R. 4-325; *see Wills*, 329 Md. at 374, 620 A.2d at 297 (explaining that one of the purposes of the rule is to clarify the subtleties of the differing standards of proof).

58. *See Wills*, 329 Md. at 374-75, 620 A.2d at 297 (explaining the operation of the rule).

59. *See id.* at 375, 620 A.2d at 297.

60. Williams v. State, 322 Md. 35, 47, 585 A.2d 209, 215 (1991). The *Williams* court noted that, although the principle of the presumption of innocence is "firmly fixed" in Maryland common law, *id.* at 45, 585 A.2d at 214, an error of this nature is amenable to harmless error analysis and does not require automatic reversal. *Id.* at 47, 585 A.2d at 215.

61. *See* Davis v. State, 48 Md. App. 474, 475, 427 A.2d 1085, 1086 (1981).

62. Lansdowne v. State, 287 Md. 232, 242-43, 412 A.2d 88, 93 (1980) (holding that a correct explanation of the reasonable doubt standard is "not confusing to the jury" and must be given when requested). The *Lansdowne* court subjected the trial court's failure to give the requested charge to harmless error scrutiny. The court concluded that, because the only defense in the case was an assertion that the State had not proved guilt beyond a reasonable doubt, the error was not harmless beyond a reasonable doubt. *Id.* at 247-48, 412 A.2d at 96.

63. *Id.* at 242, 412 A.2d at 93. In *Lansdowne*, the court observed that "unskilled and untutored lay jurors are at least as likely as some judges to misconstrue the meaning of 'reasonable doubt,'" *id.*, and cited several cases from other jurisdictions in which judges have erred in explaining the reasonable doubt standard. *See id.* at 242 n.4, 412 A.2d at 93 n.4.

repeatedly declined to require a specific instruction to be used in all cases.[64] Through a series of decisions, however, the court has provided guidance to trial courts attempting to explain the reasonable doubt standard. In *Lambert v. State*,[65] the court proposed model language for explaining the standard:

> After the judge in a criminal trial instructs the jury that the State must prove the charge beyond a reasonable doubt in order to convict, it is not erroneous to instruct the jury that evidence is sufficient to remove a reasonable doubt when it convinces the judgment of an ordinarily prudent man of the truth of a proposition with such force that he would act upon that conviction *without hesitation* in his own most important affairs.[66]

The *Lambert* court did not explicitly endorse the trial court's instruction, which did not include the "without hesitation" language found in its own model.[67] Although it stated that it "[did] not feel that the instruction to the jury in the case at bar was prejudicial," it did not explicitly rule on whether the instruction as given was proper.[68]

The model instruction offered in *Lambert* has been cited with approval in many Maryland cases examining the adequacy of reasonable doubt instructions.[69] For example, in *Bowers v. State*,[70] the court's heavy reliance on the *Lambert* instruction is apparent. In *Bowers*, the Court of Appeals addressed a claim that the trial court erroneously instructed the jury on the reasonable doubt standard in a sentencing proceeding.[71] Because the instruction given did not include the "without hesitation" language in all portions of the charge,[72] the defendant argued that the instruction erroneously conveyed the prepon-

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64. *See, e.g.*, *Wills*, 329 Md. at 382, 620 A.2d at 301; Poole v. State, 295 Md. 167, 186, 453 A.2d 1218, 1228 (1983); Montgomery v. State, 292 Md. 84, 95, 437 A.2d 654, 660 (1981).

65. 193 Md. 551, 69 A.2d 461 (1949).

66. *Id.* at 560-61, 69 A.2d at 465 (emphasis added).

67. *See id.* at 558, 69 A.2d at 464 (reviewing the trial court's instruction).

68. *Id.* at 561, 69 A.2d at 465. Although the conviction in *Lambert* was overturned on other grounds, the court stated that a definition of the reasonable doubt standard will not constitute reversible error unless it "misleads or confuses the jury." *Id.* at 559, 69 A.2d at 464.

69. *See, e.g.*, Bruce v. State, 328 Md. 594, 616-17, 616 A.2d 392, 403 (1992); Montgomery v. State, 292 Md. 84, 95, 437 A.2d 654, 659 (1981); Lansdowne v. State, 287 Md. 232, 242, 412 A.2d 88, 93 (1980). *But see* Brooks v. State, 53 Md. App. 285, 293, 452 A.2d 1285, 1289-90 (1982) (upholding an instruction that did not include the "without hesitation" language).

70. 298 Md. 115, 468 A.2d 101 (1983).

71. *Id.* at 156, 468 A.2d at 122.

72. The instruction in question read:

derance of the evidence standard to the jury.[73] In assessing the defendant's claim, the court first noted that a reviewing court should not examine any part of an instruction out of context, but it should instead evaluate the charge as a whole.[74] Then, with no further discussion of the judge's charge, the court, citing *Lambert*[75] and the Supreme Court's discussion of the jury instruction in *Holland*,[76] summarily held that the instruction as a whole was not erroneous.[77]

3. The Court's Reasoning; Analysis.—

a. The Court's Analysis of the Instruction.—In *Wills*, the sole issue before the Court of Appeals was the adequacy of the trial judge's instruction on the reasonable doubt standard.[78] The instruction offered by the trial judge was, in pertinent part, as follows:

> The State has to prove that he is guilty beyond a reasonable doubt. . . .
>
> Beyond a reasonable doubt means just that, beyond a reasonable doubt. I always say, . . . let's close our eyes and let's visualize those words, beyond a reasonable doubt. Those are the words used. . . . It is important to know that the people who made the laws, the framers of the Constitution, didn't say beyond all doubt. They could have said that, but they didn't say that, beyond a shadow of a doubt, to a mathematical certainty. They used the words, beyond a reasonable doubt, so the State's burden in a criminal case, and in this criminal case, in particular, is to prove that Mr. Wills committed one or both of these crimes beyond a reasonable

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> Now, a reasonable doubt is a doubt that is founded upon reason. It is such a doubt as would cause a reasonable person to hesitate to act in the graver or more important transactions in his life.
>
> Thus, if the evidence is of a character as to persuade you of the truth of the charges against the Defendant, with the same force that would be sufficient to persuade you to act in the more important transactions in your life then you would conclude the State has proven aggravating circumstances beyond a reasonable doubt.
>
> If, on the other hand, you could not act based on that evidence in the more important transactions in your life, then you would conclude that the State had not met the burden of proof and therefore had not proven the aggravating circumstances.

Id. at 157, 468 A.2d at 122-23.

73. *Id.* at 157-58, 468 A.2d at 123.

74. *Id.* at 159, 468 A.2d at 124.

75. *See supra* text accompanying notes 65-68.

76. *See supra* text accompanying notes 43-45.

77. *Bowers*, 298 Md. at 158-59, 468 A.2d at 123-24.

78. *Wills*, 329 Md. at 385, 620 A.2d at 302.

> doubt. A reasonable doubt is the type of doubt that would cause you to hesitate and not act in an important decision in your own life.
>
> . . . When you [apply the facts to the law] you have to be persuaded beyond a reasonable doubt those facts would be of the same nature and quality that you would rely on in making an important decision in your own life. Now, picture making one of those decisions. Picture when you got married or bought a new home or changed jobs or decided to have an operation, decided to get divorced, it might be anything, a decision that has a major impact on your life. I doubt that any of you have made one of those decisions without having some question as to whether or not this is the right thing to do. When you make a major decision, you generally have a nagging doubt, but if you weigh all of the factors, if you weigh the things that say, I should do it, and the things that say, I shouldn't do it, and you decide to go forward, then you don't have a reasonable doubt. The State's burden in this case is to persuade you to that same extent that you would rely on in making an important decision in your own life, that the defendant is guilty of one or both of these charges pending against him.[79]

In finding that the trial court's instruction was erroneous, the court isolated four elements which, when considered together, rendered the charge infirm. First, the court discussed the judge's suggestion that going forward with a major decision in one's personal life, after weighing several factors, implies the absence of a reasonable doubt.[80] Describing this reference to the balancing of factors as "confusing and misleading,"[81] the court concluded that this language conveyed the essence of the preponderance of the evidence standard for civil cases, and that "it clearly d[id] not comport with the reasonable doubt standard even when considered in the light of the entire instruction."[82]

The court then considered the "balancing-of-factors" reference in connection with three other discrete portions of the trial judge's charge to the jury. The court isolated the "hesitate and not act" lan-

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79. *Id.* at 385-86, 620 A.2d at 302-03.

80. *Id.* at 387, 620 A.2d at 303. Specifically, the court isolated the part of the judge's instruction which read: "if you weigh all of the factors, if you weigh the things that say, I should do it, and the things that say, I shouldn't do it, and you decide to go forward, then you don't have a reasonable doubt." *Id.*

81. *Id.*

82. *Id.*

guage,[83] the statements about having questions regarding important personal decisions,[84] and the remarks regarding nagging doubts.[85] Of particular concern to the court was the intimation that having a "nagging doubt" does not rise to the level of having a reasonable doubt.[86] Viewing the charge as a whole, the court had little difficulty in holding that the instruction was erroneous.[87] The court then reasoned that, because the outcome of the case turned on the credibility of the witnesses, the defendant was entitled to a new trial based on the harmless error analysis set forth in *Dorsey v. State*.[88]

b. Guidelines Established for an Acceptable Instruction.—Despite the Court of Appeals's reluctance to prescribe a universally applicable reasonable doubt instruction,[89] the *Wills* court proposed a set of guidelines to assist courts in explaining the standard.[90] As an initial matter, the court stated that a trial court's instruction must "not tend to confuse, mislead or prejudice the accused."[91] The court suggested that an instruction begin by explaining to the jury "the principle of presumption of innocence which places the burden of proof on the State, where it remains throughout the trial."[92] Further, the court

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83. "A reasonable doubt is the type of doubt that would cause you to hesitate and not act in an important decision in your own life . . . ." *Id.*

84. "I doubt whether any of you have made [an important decision in your life] without having some question as to whether or not this is the right thing to do . . . ." *Id.* (alteration in original).

85. "[W]hen you make a major decision, you generally have a nagging doubt . . . ." *Id.*

86. *Id.* at 388, 620 A.2d at 303.

87. *Id.* at 387-88, 620 A.2d at 303.

88. *Id.* at 388, 620 A.2d at 303-04 (citing Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976)). In *Dorsey*, the court stated:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated.

Dorsey, 276 Md. at 659, 350 A.2d at 678.

89. *See supra* note 64.

90. The court most likely undertook this update of the *Lambert* charge because "[the Court of Appeals] and the Court of Special Appeals are seeing increasing numbers of challenges to reasonable doubt instructions." *Wills*, 329 Md. at 389, 620 A.2d at 304 (McAuliffe, J., concurring).

91. *Id.* at 382, 620 A.2d at 301. Presumably, the court intended to express concern about confusing or misleading *the jury* and prejudicing the accused. *See* Lambert v. State, 193 Md. 551, 559, 69 A.2d 461, 464 (1949). Similarly, the Supreme Court has suggested that a principal concern in evaluating a jury instruction on reasonable doubt is whether it "could mislead the jury into finding no reasonable doubt when in fact there was some." Holland v. United States, 348 U.S. 121, 140 (1954).

92. *Wills*, 329 Md. at 382-83, 620 A.2d at 301. In fact, the court has held that a failure to instruct the jury on the presumption of innocence principle, when duly requested, is erroneous under Maryland Rule 4-325(c). *See* Williams v. State, 322 Md. 35, 47, 585 A.2d

proposed that the instruction explain that "[t]he State is not required to prove guilt beyond all possible doubt or to a mathematical certainty."[93] The court also counseled that the instruction should emphasize that "it is not enough if the evidence shows that the defendant is *probably* guilty."[94] Moreover, the court indicated that an instruction which defines reasonable doubt "by its own terms" is insufficient.[95] An adequate instruction should focus on the term "'reasonable doubt' so as to bring home to the jury clearly that both the corpus delicti of the crime and the criminal agency of the accused must be proved *beyond* a reasonable doubt."[96]

c. "Without Reservation" Language Endorsed.—Most of the elements of an acceptable reasonable doubt instruction recommended by the *Wills* court have appeared in prior opinions of Maryland courts and the Supreme Court.[97] The court's final proposal, however, departs from the relevant precedent. While recognizing that instructions containing the "without hesitation" language have been upheld for "almost half a century,"[98] the court looked to the *Maryland Pattern Jury Instructions—Criminal* 1991 in recommending a change to this long-approved charge.[99] The court suggested that the "without hesitation" language may be confusing to jurors because it suggests that the *immediacy* with which they arrived at their decision is relevant to their

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209, 215 (1991); *see also supra* text accompanying note 60. *See generally* Taylor v. Kentucky, 436 U.S. 478, 483-86 (1978) (discussing the utility and desirability of instructing the jury on the presumption of innocence).

93. *Wills*, 329 Md. at 383, 620 A.2d at 301; *see also* Lansdowne v. State, 287 Md. 232, 240, 412 A.2d 88, 92 (1980) (quoting *Lambert*, 193 Md. at 558, 69 A.2d at 464).

94. *Wills*, 329 Md. at 383, 620 A.2d at 301; *see also In re* Winship, 397 U.S. 358, 367-68 (1970) (emphasizing the critical difference between the reasonable doubt standard and the preponderance of the evidence standard).

95. *Wills*, 329 Md. at 383, 620 A.2d at 301; *see also* Montgomery v. State, 292 Md. 84, 95, 437 A.2d 654, 660 (1981) (holding that an explanation of a reasonable doubt as a "doubt which is founded upon reason," without emphasizing the "grave importance of [the jury's] decision," is an erroneous instruction "which does nothing more than define the term by using the term").

96. *Wills*, 329 Md. at 383, 620 A.2d at 301; *see also* Borza v. State, 25 Md. App. 391, 408-09, 335 A.2d 142, 152 (1975) (approving a jury instruction in an arson case in which the court instructed that the *mens rea* element of the corpus delicti must be proved beyond a reasonable doubt).

97. *See supra* notes 91-96.

98. *Wills*, 329 Md. at 383, 620 A.2d at 301 (citing Lambert v. State, 193 Md. 551, 69 A.2d 461 (1949), and its progeny).

99. *Id.* at 382, 620 A.2d at 301. The pattern jury instruction states in pertinent part: "Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief *without reservation* in an important matter in your own business or personal affairs." MPJI-Cr 2:02 (emphasis added).

verdict under the reasonable doubt standard.[100] The court was concerned that jurors would falsely conclude that a reasonable doubt existed "because they 'hesitated to act' or did not act 'without hesitation.'"[101] It envisioned that a jury might falsely conclude that a reasonable doubt exists because the jury did not come to its conclusion "immediately," because it "hesitated to act," or because it required some debate to find a defendant guilty.[102]

Wary of the risk of jury confusion resulting from the "without hesitation" or "hesitate to act" language, the court expressed its "strong belief" that "'without reservation,' as the pattern instruction suggests, is the much better term."[103] While the court unambiguously expressed its preference for the "without reservation" language, it appeared to recognize the likely residual influence of the *Lambert* line of cases. The court announced that it did not deem the "without hesitation" or the "hesitate to act" language erroneous per se.[104]

The court's concern about the "hesitate to act" phrase apparently stemmed from its belief that it might lead a jury to acquit on the basis of an unjustified finding of reasonable doubt. The petitioner's objection to the trial court's use of the "hesitation" language, however, implicates the opposite concern.[105] The trial court's instruction stated that "[a] reasonable doubt is the type of doubt that would cause you to hesitate *and not act* in an important decision in your own life."[106] Petitioner reasoned that hesitating and then not acting, as opposed to acting notwithstanding the hesitation, suggested a standard higher than the reasonable doubt standard.[107] The implication from this reading of the charge is that an incorrect conviction, not an incorrect acquittal, would be made more likely.

Judge McAuliffe's concurring opinion also raised a fundamental concern regarding the "hesitate to act" formulation. McAuliffe suggested that the analogy to decisions made in a juror's personal life may fail to convey the gravity that should attend the decision to convict a criminal defendant[108] and may present a "significant potential

100. *See Wills*, 329 Md. at 384, 620 A.2d at 301-02; *see also* Brief and Appendix of Petitioner at 8 (arguing that "[c]ombining 'without hesitation' and 'nagging doubt' in the same instruction encourages jurors to be quick, even if they are uncertain").

101. *Wills*, 329 Md. at 384, 620 A.2d at 302.

102. *Id.*

103. *Id.*

104. *Id.*

105. *See* Brief and Appendix of Petitioner at 8 n.1.

106. *Wills*, 329 Md. at 385-86, 620 A.2d at 302 (emphasis added).

107. *See* Brief and Appendix of Petitioner at 8 n.1.

108. *See Wills*, 329 Md. at 389, 620 A.2d at 304 (McAuliffe, J., concurring).

for misunderstanding."[109] McAuliffe cited *Monk v. Zelez*[110] and the Committee on Model Jury Instructions for the Ninth Circuit[111] as authority questioning the capacity of the "hesitate to act" formulation to convey accurately the stringency of the reasonable doubt standard. Judge McAuliffe noted that decisions made by jurors in their personal lives are not necessarily made beyond a reasonable doubt, but "are often, and of necessity, made on a mere preponderance of evidence."[112] Despite reservations about the propriety of the "willingness to act" analogy, Judge McAuliffe strongly embraced the pattern jury instruction and suggested that adherence to the language of that instruction would reduce the likelihood of confusing jurors or inviting appellate scrutiny.[113]

d. Harmless Error Analysis.—After finding the trial court's charge to be erroneous, the *Wills* court applied the harmless error analysis announced in *Dorsey*[114] and held that the instruction in *Wills* was not harmless beyond a reasonable doubt.[115] In developing its harmless error analysis, the *Dorsey* court found "no sound reason for drawing a distinction between the treatment of those errors which are of constitutional dimension and those other evidentiary, or procedural, errors which may have been committed during a trial."[116] It also noted, however, the Supreme Court's identification of "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[117] The Supreme Court's recent deci-

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109. *Id.* (McAuliffe, J., concurring).

110. 901 F.2d 885, 890 (10th Cir. 1990). The *Monk* court cited Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 883 (1967), for the proposition that "there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him."

111. COURT OF APPEALS FOR THE 9TH CIR. PATTERN JURY INSTRUCTIONS—CRIMINAL 3.03 (1992). The Committee on Model Jury Instructions for the Ninth Circuit rejected the analogy between the reasonable doubt standard and the decisions jurors make in their personal lives "because the most important decisions in life—choosing a spouse, buying a house, borrowing money, and the like—may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases." *Id.* at cmt.

112. *Wills*, 329 Md. at 389, 620 A.2d at 304 (McAuliffe, J., concurring).

113. Judge McAuliffe stated his "strongly held view that trial judges should instruct on the issue of reasonable doubt in the form suggested by Maryland Criminal Pattern Jury Instruction 2:02 and resist the temptation to stray from, or embellish upon, that instruction." *Id.* at 388-89, 620 A.2d at 304 (McAuliffe, J., concurring).

114. *See supra* note 88.

115. *See Wills*, 329 Md. at 388, 620 A.2d at 304.

116. Dorsey v. State, 276 Md. 638, 657, 350 A.2d 665, 677 (1976).

117. *Id.* at 648, 350 A.2d at 672 (quoting Chapman v. California, 386 U.S. 18, 23-24 (1967)). The rights identified in *Chapman* include the right to be free from coerced confession, the right to representation by counsel at trial, and the right to be tried by an

sion in *Sullivan*[118] has added to that list of rights by holding that erroneous instructions on the reasonable doubt standard can never constitute harmless error because they deprive defendants of a jury verdict as contemplated by the Sixth Amendment.[119] Thus, in future cases involving constitutionally defective jury instructions on the reasonable doubt standard, Maryland appellate courts will be required by *Sullivan* to bypass the *Dorsey* analysis and reverse automatically.

4. Conclusion.—In *Wills*, the Court of Appeals further refined what constitutes an acceptable explanation of the reasonable doubt standard. It not only held that the trial court's "nagging doubt" instruction inaccurately described the reasonable doubt standard,[120] but it also outlined guidelines for an acceptable charge. The number of reversals resulting from erroneous reasonable doubt charges should be significantly reduced because of the clear guidelines established in *Wills*, and additionally, because trial courts are now on notice that constitutionally infirm instructions will automatically result in reversal under *Sullivan*. In addition, the court's clear preference for use of the "without reservation" language may improve jury comprehension of the standard and increase the accuracy of both convictions and acquittals under the reasonable doubt standard.

KENNETH D. O'REILLY

E. Clarifying Trial Courts' Obligation to Conduct Sua Sponte Inquiries into a Defendant's Competence to Stand Trial and Defendants' Right to Allocution

In *Thanos v. State* (*Thanos I*),[1] the Court of Appeals upheld the murder conviction and death sentence of John Frederick Thanos on a number of grounds, two of which were particularly significant.[2] First,

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impartial judge. *Id.* at 648 n.6, 350 A.2d at 672 n.6. Since *Chapman*, the Supreme Court has also held that a trial court's failure to instruct the jury on the state's burden to prove the guilt of a criminal defendant beyond a reasonable doubt can never be harmless error. *See* Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979).

118. *See supra* notes 52-56 and accompanying text.

119. Sullivan v. Louisiana, 113 S. Ct. 2078, 2083 (1993) (Rehnquist, C.J., concurring).

120. *Wills*, 329 Md. at 388, 620 A.2d at 303.

1. 330 Md. 77, 622 A.2d 727 (1993). This case, later referred to as *Thanos I* by the Court of Appeals, was the first of two direct appeals by John Frederick Thanos. In *Thanos II*, Thanos appealed a second conviction and death sentence received in connection with a different murder and raised many of the same issues originally raised in *Thanos I*. *See* Thanos v. State, 330 Md. 576, 625 A.2d 932 (1993). Once again, the Court of Appeals denied Thanos's appeal and upheld his conviction. *Id.*

2. Thanos raised eight separate issues on appeal: "(1) the court failed to inquire into his competency to stand trial; (2) the court allowed him, as opposed to his counsel, to

the court held that while a trial court has a duty to ensure that a defendant is competent to stand trial, that duty is shared by both defense counsel and the defendant.[3] In the absence of an incompetency allegation by either defense counsel or the defendant, the decision to raise the issue sua sponte is a matter of discretion for the court based on the evidence presented during the trial.[4] The court also implied that the absence of an incompetency allegation by either defense counsel or the defendant creates a strong presumption that the defendant is competent to stand trial.[5]

Second, the Court of Appeals held that a defendant's right to allocute, as outlined in the Maryland Rules,[6] includes the right to decide not only if he will allocute, but also when he will allocute.[7] The court disagreed with Thanos's contention that the decision of when to allocute was a tactical consideration that should have been left to the sole discretion of Thanos's defense counsel.[8] In so holding, the court reaffirmed the importance of a defendant's right to allocution by refusing to allow defense counsel to interfere with the exercise of that right.

1. The Case.—On August 31, 1990, Gregory Allen Taylor, Jr. picked up John Thanos as he was hitchhiking in a rural area of Worcester County.[9] Once inside the car, Thanos pulled a sawed-off rifle from his duffle bag and ordered Taylor to drive to a remote

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decide when he would allocute; (3) he did not knowingly and intelligently waive his right to testify; (4) he did not knowingly, intelligently, and voluntarily waive his right to be sentenced by a jury; (5) the court allowed him to waive his right to a jury trial, over his counsel's objection; (6) he did not knowingly, intelligently, and voluntarily waive his right to a trial by jury; (7) the court admitted improper expert opinion evidence; and (8) the court failed to grant relief for discovery violations." *Thanos I*, 330 Md. at 83-84, 622 A.2d at 730. Issues (1) and (2) are addressed in this Note. Issues (3) through (6) are based on the argument that Thanos was not competent to make the decisions he did and as such, are derivative of issue (1). *Id.* at 90-94, 622 A.2d at 733-35. Issue (7) was dispensed with by the Court of Appeals with little controversy, and issue (8) was deemed harmless error. *Id.* at 94-97, 622 A.2d at 735-37.

3. *Id.* at 85, 622 A.2d at 730.

4. *Id.* at 86, 622 A.2d at 731. The court stated that "[c]onsidering all the circumstances, we conclude that the trial court did not have a sua sponte obligation to conduct a competency hearing." *Id.*

5. *See id.* at 85, 622 A.2d at 730.

6. Rule 4-343(d) states that "before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement." MD. R. 4-343(d).

7. *Thanos I*, 330 Md. at 89-90, 622 A.2d at 732-33.

8. *Id.* at 88, 622 A.2d at 732.

9. *Id.* at 81, 622 A.2d at 729.

wooded area.[10] In response to Taylor's pleas for freedom, Thanos shot Taylor three times in the head, killing him. He then fled in Taylor's vehicle.[11] Police apprehended Thanos in Delaware, where he admitted to various crimes including Taylor's murder.[12] Thanos led detectives to Taylor's body and subsequently confessed on videotape to the murder.[13]

The State charged Thanos with several crimes, including murder in the first degree, and announced its intention to seek the death penalty.[14] Thanos was tried in the Circuit Court for St. Mary's County by Judge Kaminetz, sitting without a jury. Judge Kaminetz found Thanos guilty of first degree premeditated murder, felony murder, robbery with a deadly weapon, robbery, use of a handgun in the commission of a crime of violence, and theft of property having a value over three hundred dollars.[15] At the sentencing proceeding, also before Judge Kaminetz sitting without a jury, Thanos offered four witnesses who testified as to his history of mental illness, his background of institutional placements, and his physical and emotional abuse at the hands of his father and during his incarceration in the Maryland Correctional Institution at the age of fifteen.[16] After weighing the mitigating and aggravating circumstances, the trial court sentenced Thanos to death.[17] Thanos appealed his conviction and death sentence under

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 81-82, 622 A.2d at 729.
16. *Id.* The Maryland Correctional Institution is an adult facility. *Id.*
17. *Id.* at 83, 622 A.2d at 729-30. The trial court found six mitigating circumstances:

> [(1)] that Thanos's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance"[;] . . . [(2) Thanos] is a product of a dysfunctional family; [(3)] early suggestions for mental health intervention for [Thanos] and his family were not followed; [(4) Thanos] was emotionally and physically abused as a child; [(5) Thanos] was inappropriately incarcerated in an adult correctional facility as a juvenile; and [(6) Thanos] was entitled to, and received, the mercy of the court.

Id., 622 A.2d at 729. The trial court found only one aggravating circumstance: Thanos committed the murder while committing a robbery. *Id.*, 622 A.2d at 730. The court concluded that the aggravating circumstance outweighed the mitigating circumstances and sentenced Thanos to death. *Id.* *See generally* MD. ANN. CODE art. 27, § 413(d)(10), (g)(4), (g)(8) (1992 & Supp. 1993) (outlining the recognition of aggravating and mitigating circumstances).

the provisions of Article 27, section 414(a) of the Code and Maryland Rule 8-306(c)(1).[18]

2. Legal Background.—

a. Competence to Stand Trial.—Criminal defendants have a Fourteenth Amendment due process right not to be subjected to a trial while incompetent.[19] In 1975, Chief Justice Burger stated that "it has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[20] The Maryland legislature recognized this right in enacting section 12-103(a) of the Health-General Article, which mandates that "if, before or during a trial, the defendant in a criminal case appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is competent to stand trial."[21] Consistent with the Supreme Court's decisions on the issue, the Code defines "incompetent to stand trial" as "not able . . . to understand the nature or object of the proceeding[ ] or . . . to assist in one's defense."[22]

Slightly expanding section 12-103(a), the Court of Special Appeals ruled in 1986 that the trial court's duty to determine the competence of the defendant "is triggered in one of three ways: (1) upon an allegation by the accused himself that he is incompetent; (2) upon an allegation by defense counsel that the accused is incompetent; and (3) upon the court's sua sponte decision that the accused appears to be incompetent."[23] While not adding significantly to the provisions of section 12-103(a), this holding made clear that courts have an obliga-

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18. *Thanos I*, 330 Md. at 83, 622 A.2d at 720. Section 414(a) states that "whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record." MD. CODE ANN. art. 27, § 414(a) (1992 & Supp. 1993). Rule 8-306(c)(1) states that "whenever a sentence of death is imposed, there shall be an automatic appeal to the Court of Appeals of both the determination of guilt and the sentence, whether or not the determination of guilt was based on a plea of guilty." MD. R. 8-306(c)(1).

19. *Thanos I*, 330 Md. at 84, 622 A.2d at 730 (citing Drope v. Missouri, 420 U.S. 162, 171 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Trimble v. State, 321 Md. 248, 582 A.2d 794 (1990)).

20. *Drope*, 420 U.S. at 171.

21. MD. CODE ANN., HEALTH-GEN. § 12-103(a) (1990).

22. *Id.* § 12-101(e) (1990 & Supp. 1993).

23. Johnson v. State, 67 Md. App. 347, 358-59, 507 A.2d 1134, 1140, *cert. denied*, 307 Md. 260, 513 A.2d 314, *cert. denied*, 479 U.S. 993 (1986).

tion to determine whether or not defendants are competent to stand trial, regardless of the action (or inaction) of defendants or their counsel.

In 1975, the Supreme Court attempted to identify factors that might trigger a court's inquiry into a defendant's competence. It stated:

> [E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.[24]

b. Allocution.—The right of allocution has a long and varied history in both English and American common law. When criminal defendants had no right to counsel and were considered incompetent to testify on their own behalf, allocution was viewed as a defendant's only opportunity to address the court.[25] Attesting to its fundamental importance, Maryland formally recognized this common law right in its 1776 Declaration of Rights.[26]

The Court of Appeals first addressed the right of allocution in 1914. In *Dutton v. State*,[27] the court endorsed the practice of providing the defendant with an opportunity to address the court in all cases in

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24. *Drope*, 420 U.S. at 180 (discussing Pate v. Robinson, 383 U.S. 375 (1966)).

25. *See* Harris v. State, 306 Md. 344, 354, 509 A.2d 120, 125 (1986) (summarizing the history of the right to allocution in Maryland) (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368-71 (1769); Paul W. Barrett, *Allocution*, 9 MO. L. REV. 115, 120-24 (1944); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 821-22, 832-33 (1968); Green v. United States, 365 U.S. 301, 304 (1961); Fred Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1, 9 (1968); Annotation, *Necessity and Sufficiency of Question to Defendant as to Whether He Has Anything to Say Why Sentence Should Not Be Pronounced Against Him*, 96 A.L.R.2d 1292, 1295 (1964)).

26. *Id.* at 355, 509 A.2d at 125. Article 5 of the Declaration of Rights states in part: "[T]he Inhabitants of Maryland are entitled to the Common Law of England . . . , according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six . . . ." MD. CONST. DECL. RTS. art. 5 (1981).

27. 123 Md. 373, 91 A. 417 (1914).

which sentences of death or imprisonment could be imposed.[28] In 1962, the judiciary adopted rule 761, which applied to both capital and noncapital cases and provided that "before imposing sentence the court shall afford an accused or his counsel an opportunity to make a statement and to present information in mitigation of punishment."[29] Rule 761 was subsequently rescinded and replaced by rule 772, which like its predecessor, applied to both capital and noncapital cases. Rule 772 provided that "before imposing sentence the court shall inform the defendant that he has the right, personally and through counsel, to make a statement and to present information in mitigation of punishment, and the court shall afford an opportunity to exercise this right."[30] In 1979, the Court of Appeals amended rule 772 to apply only to noncapital cases and adopted rule 772A for application in capital cases. Rule 772A did not address a defendant's right to allocution and remained the law in Maryland until the adoption of rule 4-343 in 1984. Rule 4-343(d), which governs the right of allocution in Maryland courts today, states that in capital cases, "before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement."[31]

In *Harris v. State*,[32] the Court of Appeals reaffirmed the importance of the right to allocution by holding that denial of a defendant's right to allocute will void the sentence and require a new sentencing proceeding.[33] That same year, the court addressed the question of whether a prosecutor may comment on a defendant's allocution and held that "allocution is more like testimony than silence and for Fifth Amendment purposes is testimonial, carrying with it, at a minimum, a

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28. *Id. Dutton* dealt with a defendant who had been sentenced to death without first having been asked whether he wanted to make a statement to the court. After a generally favorable discussion of the right of allocution, the Court of Appeals held that "it is not reversible error, even in capital cases, not to ask the prisoner if he has any reason to give why sentence should not be passed, unless it is apparent that the prisoner was or may have been injured by the omission." *Id.* at 383, 91 A. at 421.

29. MD. R. 761(a) (1962) (rescinded July 1, 1977 and replaced by MD. R. 772).

30. MD. R. 772 (1981) (amended Jan. 1, 1979).

31. MD. R. 4-343(d).

32. 306 Md. 344, 509 A.2d 120 (1986).

33. *Id.* at 359, 509 A.2d at 127. In *Harris*, the trial court ruled that it is the defendant's decision whether he or his counsel will address the jury. The court further specified that the right of allocution cannot be exercised by both defendant and counsel. *Id.* at 350, 509 A.2d at 123. When pressed on this issue by Harris's counsel, who argued that the court was effectively denying the defendant his right to allocute, the court replied, "[T]his Court is not depriving Mr. Harris of his right to address the jury. He may do so. If he elects to do so, [counsel] may not argue also." *Id.* at 351, 509 A.2d at 123.

waiver of any privilege to avoid comment by the prosecutor on the allocution."[34]

3. The Court's Reasoning.—

a. Sua Sponte Obligation to Determine if a Defendant Is Competent to Stand Trial.—The Court of Appeals began by acknowledging that a trial court has an obligation to make a determination of whether a defendant is competent to stand trial if the defendant alleges he is incompetent, defense counsel alleges the defendant is incompetent, or the defendant appears to the court to be incompetent.[35] During the trial, neither Thanos nor his attorneys alleged that Thanos was incompetent to stand trial.[36] Similarly, the four experts that testified for Thanos at the sentencing proceeding did not indicate that he was incompetent to stand trial.[37] Furthermore, when the State moved before trial to conduct a competency hearing, Thanos's counsel successfully argued against the motion on the grounds that "neither the defendant nor his counsel ha[d] alleged the Defendant [was] incompetent and in the Defendants [sic] prior Court appearance, the Court did not indicate that the Defendant appeared incompetent."[38] Thanos's counsel added that "the Defendant now has counsel who can keep the Court appraised should a competency issue arise in the future."[39] Thus, the Court of Appeals found that Thanos and his counsel had ample opportunity before trial to raise the issue of competence and chose not to do so.[40] The only factor remaining for the court to consider was Thanos's behavior during trial. The court stated:

> As we see it, Thanos sought to have it both ways in this case, maintaining at first that he was not incompetent, thereby denying the State an opportunity to evaluate him; then, upon receiving a death sentence, maintaining that his bizarre behavior warranted a competency hearing. Our independent review of the record does not indicate that the trial court erred in failing to grant Thanos a competency hearing.[41]

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34. Booth v. State, 306 Md. 172, 203, 507 A.2d 1098, 1114, *cert. granted in part*, 479 U.S. 882 (1986), *vacated in part and remanded*, 482 U.S. 496, *reh'g denied*, 483 U.S. 1056 (1987).

35. *Thanos I*, 330 Md. at 85, 622 A.2d at 730; *see supra* note 23 and accompanying text.

36. *Thanos I*, 330 Md. at 85, 622 A.2d at 730; Brief of Appellee at 7.

37. *Thanos I*, 330 Md. at 86, 622 A.2d at 731; Brief of Appellee at 19.

38. *Thanos I*, 330 Md. at 86, 622 A.2d at 731.

39. *Id.*

40. *See id.*

41. *Id.*

The court conceded that Thanos made highly inappropriate remarks during both the trial and sentencing proceedings,[42] but was unconvinced that Thanos's behavior amounted to incompetency.[43] Applying the two-pronged test for competence to stand trial articulated by the Supreme Court in *Dusky v. United States*[44] and section 12-101(e) of the Maryland Code,[45] the Court of Appeals felt that Thanos exhibited both the "present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."[46] The court determined Thanos's proffered justifications for the decisions he made to be reasonable and articulate and to in no way give rise to an inference

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42. *Id.* at 87, 622 A.2d at 732. For example, Thanos had the following exchange with Judge Kaminetz over the mitigating circumstance of "youthful age":

> THE DEFENDANT: Excuse me. You said youthful age?
>
> THE COURT: The youthful age of the Defendant, of you.
>
> THE DEFENDANT: Suppose the Defendant was extremely old?
>
> THE COURT: Well, that is obviously something for the jury to consider.
>
> THE DEFENDANT: Because I just calculated that in dog years I would be like 200 and some years old.

Brief of Appellant at 17-18.

At sentencing, Thanos offered the following remarks:

> Okay. Well, I was planning on allocuting, you know, rebutting every witness, but I changed my mind on that. First, I want to give my compliments to the lovely Clerk Allison, and that pink ensemble she's wearing. Very nice. And to the St. Mary's psychiatrist, she's a very tasty looking morsel. And Channel 13, Paulette Tubman, who's an extremely sexy lady.
>
> And the appropriate press, Debrah Reittman, her body won't quit. As far as rebutting anything, I don't think I will, because I don't want to give a lot of credence to it. To me, it sounds like a whole lot of pretentious rhetoric. Something you might look forward to seeing on one of the soap operas. A whole lot of malarkey. So I'm not going to dignify any of it.
>
> I think you would have to agree with me, though, psychiatry in general has got to be a good hustle. As far as the sentence I would like to have, I only have a few choices, I think. So I think I would take life without parole, without the possibility of escape. I don't think it should take you too long to review these facts, if you want to call them facts, or innuendo.
>
> I think you've had sufficient time over the weekend to ponder all this, and render a fast, speedy opinion. And the only thing else I can think of to say is, Allison, you look good. Great. That's it.

Brief of Appellant at 19-20.

Finally, when sentenced to death, Thanos asked, "Is that death by gas, or death by roo-roo?" *Thanos I*, 330 Md. at 85, 622 A.2d at 731; Brief of Appellant at 21.

43. *Thanos I*, 330 Md. at 87, 622 A.2d at 731.

44. 362 U.S. 402 (1960) (per curiam). In *Dusky*, the Court stated that the test for "competency to stand trial" must be "'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *Id.* at 402.

45. *See supra* note 22 and accompanying text.

46. *Thanos I*, 330 Md. at 87, 622 A.2d at 731.

that Thanos was incompetent to stand trial.[47] Consequently, the Court of Appeals found no error in the trial court's failure to hold a competency hearing.[48]

b. The Right of Counsel to Determine when a Defendant Will Allocute.—After discussing the history of allocution in general and in Maryland specifically, the Court of Appeals rejected Thanos's argument that the decision concerning if and when a defendant will allocute is a tactical one that should be left to the discretion of defense counsel and that, by allowing Thanos to allocute when he wished, the trial court thwarted defense counsel's plans and committed reversible error.[49]

The court looked to *Treece v. State*,[50] in which it considered whether a defendant could "override" the decision of counsel to plead not criminally responsible.[51] There, the court held that even though "when a defendant is represented by counsel, it is counsel who is in charge of the defense and his say as to strategy and tactics is generally controlling,"[52] "there are some decisions that a competent defendant is entitled to make, regardless of the views of counsel, if the defendant makes them knowingly and voluntarily."[53] Although the *Treece* court did not attempt to list all such decisions, it did categorize such decisions as ones that "involve[ ] a choice that will inevitably have important personal consequences for [the defendant]."[54] In justifying its resolution of this issue, the *Treece* Court cited *Rock v. Arkansas*,[55] a case involving a defendant's decision to testify on his own behalf, as an example of the type of decision the defendant is entitled to make.[56]

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47. *Id.* at 86-87, 622 A.2d at 731.

48. *Id.*

49. *Id.* at 87-88, 622 A.2d at 732. For support, Thanos cited Parren v. State, 309 Md. 260, 523 A.2d 597 (1987), in which the court appeared to vest decision-making authority in counsel when a defendant has chosen to be represented by counsel. *Parren* dealt with the issue of hybrid representation—a defendant representing himself pro se with the "assistance" of counsel. The court held that the right of counsel and the right to defend pro se cannot be asserted simultaneously and that when a defendant has chosen the right of counsel, it is counsel who "calls the shots." *Parren*, 309 Md. at 264, 523 A.2d at 599.

50. 313 Md. 665, 547 A.2d 1054 (1988).

51. *Id.*

52. *Id.* at 671, 547 A.2d at 1057 (quoting *Parren*, 309 Md. at 265, 523 A.2d at 599); *see supra* note 49.

53. *Treece*, 313 Md. at 673, 547 A.2d at 1058.

54. *Id.* at 674, 547 A.2d at 1058-59.

55. 483 U.S. 44 (1987).

56. *Treece*, 313 Md. at 674, 547 A.2d at 1059.

Ultimately, the Court of Appeals in *Thanos I* combined its holding in *Booth*,[57] that allocution is "like" testimony, with the Supreme Court's holding in *Rock*,[58] that the defendant decides whether to testify, to conclude that it is the defendant who decides if and when to allocute[59] and that neither the court nor defense counsel can interfere with a defendant's exercise of that right.[60]

4. Analysis.—

a. Competence to Stand Trial.—On one level, *Thanos I* is a fairly uncomplicated decision. Under Maryland statutes and case law, a trial court has an obligation to raise the issue of a defendant's competence to stand trial if the court determines that there is a question as to a defendant's competence.[61] The trial court in *Thanos I* did not raise the issue because it did not feel there was a question as to Thanos's competence to stand trial, and the Court of Appeals agreed. On another level, however, the Court of Appeals accomplished several things in *Thanos I*. First, it explicitly affirmed the Court of Special Appeals's holding in *Johnson v. State*[62] that the burden to raise the issue of a defendant's competence to stand trial rests with either the defendant, the defendant's counsel, or the court.[63]

Second, the Court of Appeals adopted the criteria established by the Supreme Court in *Pate v. Robinson*[64] and *Drope v. Missouri*[65] for trial courts' determination of whether a competency hearing is warranted. The application of these criteria is significant because, at first glance, it might appear, as Thanos's defense counsel argued on appeal, that the Court of Appeals focused almost entirely on Thanos's demeanor during trial, to the exclusion of other evidence such as his history of mental illness. A closer look, however, shows that, based on the factors outlined in *Drope*,[66] Thanos gave the Court of Appeals very little to consider. Neither defense counsel nor Thanos ever raised the issue of

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57. *See supra* note 34 and accompanying text.

58. *See supra* notes 55-56 and accompanying text.

59. *Thanos I*, 330 Md. at 89-90, 622 A.2d at 733.

60. *Id.*

61. *See supra* note 21 and accompanying text (discussing MD. CODE ANN., HEALTH-GEN. § 12-103(a) (1990)); *supra* note 23 and accompanying text (discussing Johnson v. State, 67 Md. App. 347, 507 A.2d 1134 (1986)).

62. 67 Md. App. 347, 507 A.2d 1134 (1986); *see supra* note 23 and accompanying text.

63. *Thanos I*, 330 Md. at 85, 622 A.2d at 730.

64. 383 U.S. 375 (1966).

65. 420 U.S. 162 (1975).

66. *See supra* note 24 and accompanying text.

Thanos's competence to stand trial.[67] Defense counsel presented no testimony regarding Thanos's history of mental illness until sentencing, at which time it was arguably irrelevant to the issue of Thanos's competence to stand trial.[68]

Third, the Court of Appeals clearly distinguished between what might be considered inappropriate or even bizarre behavior on the part of a defendant during trial or sentencing proceedings and a defendant's competence to stand trial. Though inappropriate or bizarre behavior during trial may, in certain circumstances, be sufficient to trigger a court's obligation to conduct a competency hearing sua sponte, the question is not whether the behavior is bizarre, but whether the defendant is able to understand the nature of the proceedings and assist in the defense.[69]

Finally, the Court of Appeals indicated that although trial courts share the burden of raising the issue of a defendant's competence to stand trial, a court rarely will be obligated to conduct a sua sponte hearing when neither the defendant nor defense counsel has alleged incompetence.[70] Because defense counsel is in a much better position than the court to determine whether the defendant is able to consult with defense counsel and assist in the defense,[71] the burden rests primarily with defense counsel to raise a competence issue with the court.[72]

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67. *See supra* notes 36-39 and accompanying text.

68. Section 12-103(a) of the Health-General Article places an obligation on the court to determine a defendant's competence to stand trial "*before or during a trial.*" MD. CODE ANN., HEALTH-GEN. § 12-103(a) (1990) (emphasis added). Even if the testimony of the four expert witnesses Thanos presented at sentencing had specifically stated that Thanos was incompetent to stand trial, the trial portion of proceedings had already concluded. *See Thanos I*, 330 Md. at 87, 622 A.2d at 731.

69. *See supra* notes 20-22 and accompanying text (discussing *Drope*, 420 U.S. at 171, and MD. CODE ANN., HEALTH-GEN. § 12-101(e) (1990 & Supp. 1993)).

70. This inference is drawn from the amount of attention the court gave to the fact that Thanos's counsel did not raise the issue of Thanos's competence to stand trial. *See Thanos I*, 330 Md. at 85, 622 A.2d at 730. If the court's sua sponte obligation to inquire into a defendant's competency to stand trial is truly independent of defense counsel's obligation, as § 12-103(e) would seem to suggest, defense counsel's failure to raise the issue could have been dispensed with by the court in a single sentence. Similarly, defense counsel's opposition to the State's pretrial request for a competency hearing and its statements that it would keep the court apprised if such an issue arose are both arguably irrelevant to the question of whether sufficient evidence existed to warrant a sua sponte inquiry, but the court emphasized both in its affirmation of the trial court's decision not to hold a competency hearing. *Id.* at 86, 622 A.2d at 731.

71. Brief of Appellee at 16.

72. In fact, this burden actually might constitute a duty on the part of defense counsel. For example, at what point did Thanos's defense counsel decide that Thanos was incompetent to stand trial? If the determination was made during the trial, defense counsel may have failed to provide Thanos with effective assistance of counsel as required by the Sixth

b. Protecting the Right of Allocution.—The Court of Appeals's ruling on Thanos's right to determine if and when to allocute flows logically from previous Maryland decisions.[73] It complements the court's earlier decision in *Booth*,[74] allowing a prosecutor to comment on a defendant's allocution, by allowing the defendant to decide if and when to allocute, and thus, whether to risk prosecutorial comment on that allocution. In *Thanos I*, the Court of Appeals characterized the right of allocution as a "precious opportunity for rebuttal,"[75] and by its ruling, ensured that nothing and no one will interfere with a defendant's right to exercise that opportunity.

5. Conclusion.—In *Thanos I*, the Court of Appeals held that the trial court did not err by not holding a hearing to determine whether Thanos was competent to stand trial[76] and that it is the defendant, not defendant's counsel, who decides if and when to allocute.[77] *Thanos I* points out the difficulty in determining exactly what triggers a court's obligation to inquire sua sponte into a defendant's competency. Although there may not be any "fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed,"[78] the Court of Appeals's decision in *Thanos I* faithfully follows both the letter and the spirit of previous Maryland and Supreme Court case law. Thanos may have been unwilling to assist in his defense or unwilling to acquiesce in the decisions of his defense counsel, but this lack of cooperation alone did not make him incompetent to stand trial.

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Amendment and by Maryland's Rules of Professional Conduct. *See* U.S. CONST. amend. VI; MD. R.P.C. 1.1—Competence; MD. R.P.C. 1.3—Diligence.

73. *See, e.g.*, Shifflett v. State, 315 Md. 382, 554 A.2d 814 (1989); Treece v. State, 313 Md. 665, 547 A.2d 1054 (1988); Booth v. State, 306 Md. 172, 507 A.2d 1098 (1986); Harris v. State, 306 Md. 344, 509 A.2d 120 (1986); Logan v. State, 289 Md. 460, 425 A.2d 632 (1981); Miller v. State, 67 Md. App. 666, 509 A.2d 135, *cert. denied*, 307 Md. 260, 513 A.2d 314 (1986).

74. 306 Md. 172, 507 A.2d 1098.

75. *Thanos I*, 330 Md. at 90, 622 A.2d at 733.

76. *Id.* at 86, 622 A.2d at 731.

77. *Id.* at 89, 622 A.2d at 733.

78. Drope v. Missouri, 420 U.S. 162, 180 (1975); *see supra* note 24 and accompanying text.

F. Defining the Rule of Merger with Regard to the Dangerous and Deadly Weapons Statute

In *Eldridge v. State*,[1] the Court of Appeals held that Article 27, section 36(a) of the Code creates the single offense of "carrying a deadly weapon," which may be committed by concealing a weapon or carrying a weapon openly.[2] As a result, the court found it impermissible to convict the defendant in the case of both carrying a concealed dangerous or deadly weapon and carrying the same weapon openly with intent to injure.[3] The court further held that a court could not impose separate sentences for robbery with a deadly weapon and for carrying the same deadly weapon used in the robbery.[4]

1. The Case.—James Eldridge was convicted in 1991 of robbery with a dangerous and deadly weapon[5] under Article 27, section 488 of the Code,[6] and of wearing or carrying such a weapon both concealed, and openly with intent to injure, under Article 27, section 36(a).[7] Imposing the maximum sentence for each of the three convictions, the trial court sentenced Eldridge to twenty years for robbery with a deadly weapon and three years each for the two dangerous weapons

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1. 329 Md. 307, 619 A.2d 531 (1993).

2. *Id.* at 313, 619 A.2d at 534.

3. *Id.* at 315, 619 A.2d at 535.

4. *Id.* at 320, 619 A.2d at 538.

5. Eldridge used a starter's pistol, *id.* at 310-11, 619 A.2d at 533, which is considered a dangerous weapon for purposes of robbery with a deadly weapon and carrying a dangerous or deadly weapon. Jackson v. State, 231 Md. 591, 595, 191 A.2d 432, 434-35 (1963).

6. Section 488 provides in pertinent part: "Every person convicted of the crime of robbery or attempt to rob with a dangerous or deadly weapon or accessory thereto, shall . . . be sentenced to imprisonment in the Maryland Penitentiary for not more than twenty years." MD. ANN. CODE art. 27, § 488 (1992).

7. *See Eldridge*, 329 Md. at 308-09, 311, 619 A.2d 532, 533. Section 36 provides in pertinent part:

> Every person who shall wear or carry any . . . dangerous or deadly weapon of any kind, whatsoever (penknives without switchblades and handguns, excepted) concealed upon or about his person, and every person who shall wear or carry any such weapon . . . openly with the intent or purpose of injuring any person in any unlawful manner, shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than $1,000 or be imprisoned in jail, or sentenced to the Maryland Department of Correction for not more than three years; and in case of conviction, if it shall appear from the evidence that such weapon was carried, concealed or openly, with the deliberate purpose of injuring the person or destroying the life of another, the court shall impose the highest sentence of imprisonment prescribed.

MD. ANN. CODE art. 27, § 36(a) (1992).

convictions.[8] All three sentences were to run consecutively for a total of twenty-six years of imprisonment.[9]

On appeal, Eldridge contended that the trial court should have merged the dangerous weapons convictions into the armed robbery conviction.[10] In an unpublished opinion, the Court of Special Appeals, relying on its decision in *Selby v. State*,[11] affirmed the judgment of the trial court.[12] It ruled that because the weapons charges and the armed robbery offense were not the same under the "required evidence" test set forth in *Blockburger v. United States*,[13] the "so-called 'Rule of Lenity'" did not apply.[14] The Court of Appeals granted certiorari and reversed on the issue of merger.[15]

2. Legal Background.—The Double Jeopardy Clause of the Fifth Amendment[16] bars the government from prosecuting a defendant for a crime after the defendant is acquitted or convicted of that crime and affords a defendant protection from receiving multiple punishments for the "same crime."[17] The Double Jeopardy Clause, however, imposes limitations on the judicial process—on government prosecutors and the courts—not on the legislative process.[18] Legislatures, therefore, retain the power to "define crimes and fix punishments."[19]

In Maryland, the "required evidence" test determines whether two offenses arising from a single transaction constitute the "same crime" for sentencing purposes.[20] The Supreme Court established

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8. *Eldridge*, 329 Md. at 309, 619 A.2d at 532.

9. *Id.*

10. Eldridge v. State, No. 91-1161, slip op. at 1 (Md. Ct. Spec. App. May 14, 1991).

11. 76 Md. App. 201, 219, 544 A.2d 14, 23 (1988) (holding that a conviction for carrying a concealed dangerous or deadly weapon, or carrying such a weapon openly with intent to injure, does not merge into robbery with a dangerous or deadly weapon), *aff'd on other grounds*, 319 Md. 174, 571 A.2d 1236 (1990).

12. *Eldridge*, No. 91-1161, slip op. at 1-2.

13. 284 U.S. 299 (1932); *see infra* notes 21-23 and accompanying text.

14. *Eldridge*, No. 91-1161, slip op. at 1.

15. *Eldridge*, 329 Md. at 320, 619 A.2d at 538.

16. The Fifth Amendment states in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The provision applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969).

17. Brown v. Ohio, 432 U.S. 161, 165 (1977).

18. *See id.*

19. *Id.*

20. *See* Biggus v. State, 323 Md. 339, 351, 593 A.2d 1060, 1066 (1991) (holding that a battery conviction merged into a third degree sexual assault under the required evidence test); Newton v. State, 280 Md. 260, 273-74, 373 A.2d 262, 269 (1977) (stating that under the required evidence test, a felony murder and the underlying felony are the same offense).

the required evidence test, also known as the "*Blockburger* test," in *Blockburger v. United States*.[21] Under the test, if all the elements of one offense are also the elements of a second offense arising out of the same transaction, the former offense will merge into the latter offense.[22] When the required evidence test mandates a merger, double jeopardy principles usually bar multiple sentences.[23] However, because the Double Jeopardy Clause does not limit legislatures, a court must impose two sentences when a legislature manifests an intent to impose separate punishments for two offenses that would otherwise merge.[24] When the legislature's intent as to the merger of two offenses is not clear, the courts will either consider other factors, such as the approach taken by other jurisdictions, the punishments that the state has imposed in the past, the general fairness of multiple punishments under the specific facts; or they will apply the "rule of lenity" in construing the statute.[25]

Courts apply the rule of lenity when multiple punishments conceivably could be imposed based on one transaction, but it is not clear whether the legislature intended separate punishments. The rule of lenity provides that doubts about the legislature's intent will be resolved in favor of the defendant and, therefore, against multiple punishments.[26] There is considerable disagreement, however, about whether the rule of lenity is synonymous with the required evidence test or is a more flexible guide for sentencing purposes. In 1990, the Court of Appeals addressed this confusion in *White v. State*,[27] stating:

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21. 284 U.S. 299 (1932).

22. *Id.* at 304.

23. *See* Middleton v. State, 318 Md. 749, 757-58, 569 A.2d 1276, 1279-80 (1990).

24. *See* Frazier v. State, 318 Md. 597, 613, 569 A.2d 684, 692 (1990) (holding that a defendant with a prior conviction for attempted armed robbery with a deadly weapon could be convicted of both carrying a pistol in violation of Article 27, § 445(c), which makes it unlawful for anyone convicted of a crime of violence to possess a pistol or revolver, and carrying a handgun in violation of Article 27, § 36B(b)); Whack v. State, 288 Md. 137, 143, 416 A.2d 265, 268 (1980) (holding that use of a handgun in commission of a robbery does not merge into the robbery with a deadly weapon conviction); *see also infra* notes 52-55 and accompanying text (discussing *Whack*).

25. State v. Lancaster, 332 Md. 385, 394 n.9, 631 A.2d 453, 458 n.9 (1993).

26. *See Whack*, 288 Md. at 144-45, 416 A.2d at 268-69 (explaining that the rule of lenity means that courts will not interpret a statute "'so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what [the legislature] intended'") (citation omitted); *see also* Williams v. State, 323 Md. 312, 323, 593 A.2d 671, 676 (1991) (holding that assault with intent to murder merges into attempted first degree murder under the rule of lenity); White v. State, 318 Md. 740, 748, 569 A.2d 1271, 1275 (1990) (applying the rule of lenity to hold that child abuse merges into homicide).

27. 318 Md. 740, 569 A.2d 1271 (1990).

> A few cases have attempted to formulate fixed criteria for deciding whether to apply the rule of lenity, and have indicated that unless two offenses merge under either the required evidence test or under these fixed criteria, there can be no merger. In our view, however, there should not be any rigid or fixed criteria for applying the rule of lenity. Rather, as a principle of statutory construction, it should be used like other principles of statutory construction as an aid in ascertaining legislative intent with respect to a statutory offense.[28]

The *White* court held that a child abuse conviction merged into a homicide conviction under the rule of lenity even though it would not merge under the required evidence test.[29] In support of its holding, the court looked to the traditional policy of merging felony murder and premeditated murder and merging the different statutory aggravated assaults, although they would be considered separate offenses under the required evidence test.[30]

Apparently, however, the *White* decision did not settle the question surrounding the application of the rule of lenity. After *White*, the Court of Special Appeals, in *Mauk v. State*,[31] set forth a much narrower interpretation of the rule. The *Mauk* court held that the rule of lenity applies when two offenses meet the standard of the required evidence test.[32] In effect, the court confused the required evidence test—a rule of law—with the rule of lenity—a rule of statutory construction.[33] Despite the Court of Special Appeals's attempt in *Mauk* to limit the applicability of the rule of lenity, the Court of Appeals has continued to advocate the *White* court's position, distinguishing between the required evidence test and the rule of lenity.[34] For example, in *State v. Lancaster*,[35] the court stated that "the rule of lenity . . . is applicable when offenses are not deemed the same under the required evidence test."[36]

a. Weapons Convictions.—The Court of Appeals faced the issue of multiple prosecutions for carrying a single handgun in *Webb v.*

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28. *Id.* at 745, 569 A.2d at 1274 (citations omitted).
29. *Id.* at 744, 748, 569 A.2d at 1273, 1275.
30. *Id.* at 746-47, 569 A.2d at 1274.
31. 91 Md. App. 456, 605 A.2d 157 (1992).
32. *See id.* at 467-68, 605 A.2d at 162-63.
33. *See* State v. Lancaster, 332 Md. 385, 409, 631 A.2d 453, 466 (1993) ("[T]he required evidence test is not simply another rule of statutory construction. Instead, it is a long-standing rule of law to determine whether one offense is included within another . . . .").
34. *Id.* at 413 n.16, 631 A.2d at 468 n.16.
35. 332 Md. 385, 631 A.2d 453 (1993).
36. *Id.* at 413 n.16, 631 A.2d at 468 n.16.

State.[37] In *Webb*, the defendant was first convicted and sentenced to one year of imprisonment for violating Article 27, section 36B(b).[38] He subsequently was found guilty of violating the same statute in an incident that occurred approximately three hours prior to the incident that resulted in the first conviction.[39] He was sentenced to another three years imprisonment, to run immediately following his first sentence.[40] The Court of Appeals granted certiorari in *Webb* to decide whether the defendant could be prosecuted, convicted, and sentenced "twice for carrying a single handgun over a three hour period[ ]."[41] In its opinion, the court equated the offense created by the statute with a possession offense and concluded that, like possession, any violation of the statute is a continuing violation.[42] The court concluded that the law is concerned with the carrying of the handgun, regardless of how that carrying is done—"whether concealed or open."[43] Stating that it could not "read into the plain language of the section" any intention on the part of the legislature that multiple victims or the carrying of the weapon over an extended period of time give rise to separate offenses,[44] the court reversed the second conviction.[45]

In *Hunt v. State*,[46] the defendant was convicted of using a handgun in the commission of a violent crime in violation of Article 27, section 36B(d),[47] and of unlawfully wearing, carrying, or transporting a handgun in violation of Article 27, section 36B(b).[48] The former conviction carried a sentence of twenty years; the latter carried a sentence of three years.[49] The Court of Appeals found that, while section 36B(d) explicitly called for a separate sentence over and above the

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37. 311 Md. 610, 536 A.2d 1161 (1988).

38. *Id.* at 613, 536 A.2d at 1163. Section 36B(b) provides in pertinent part: "Any person who shall wear, carry or transport any handgun, whether concealed or open, upon or about his person . . . shall be guilty of a misdemeanor . . . ." MD. ANN. CODE art. 27, § 36B(b) (1992).

39. *Webb*, 311 Md. at 613, 536 A.2d at 1163.

40. *Id.* at 613-14, 536 A.2d at 1163.

41. *Id.* at 614, 536 A.2d at 1163.

42. *Id.* at 615, 536 A.2d at 1164.

43. *Id.* at 617, 536 A.2d at 1165.

44. *Id.* at 618, 536 A.2d at 1165.

45. *Id.* at 619, 536 A.2d at 1166.

46. 312 Md. 494, 540 A.2d 1125 (1988).

47. Section 36B(d) reads in pertinent part: "Any person who shall use a handgun . . . in the commission of any felony or any crime of violence as defined in §441 of this article shall be guilty of a separate misdemeanor . . . ." MD. ANN. CODE art. 27, § 36B(d) (1992).

48. *Hunt*, 312 Md. at 497, 540 A.2d at 1126; *see supra* note 38 (setting forth the relevant text of § 36B(b)).

49. *Hunt*, 312 Md. at 509-10, 540 A.2d at 1132-33.

sentence for the underlying violent crime, section 36B(b) did not display the same clarity of intent.[50] Thus, the court concluded that the legislature did not intend separate punishments and vacated the judgment as to the handgun violation under section 36B(b).[51]

b. Merger of Weapons Offenses into Other Crimes.—In *Whack v. State*,[52] the Court of Appeals affirmed the defendant's separate convictions and sentences for robbery with a deadly weapon, the use of a handgun in the commission of a felony,[53] and assault.[54] The court concluded that, even assuming that the offenses of robbery with a deadly weapon and use of a handgun in the commission of a felony would have merged under *Blockburger*, it was clear that the legislature "intended to authorize the imposition of punishment under both . . . when one commits a robbery with a handgun."[55]

The statute prohibiting the carrying of dangerous and deadly weapons, however, does not include an explicit demand or authorization by the legislature for separate sentencing.[56] Nevertheless, in *Selby v. State*,[57] the Court of Special Appeals held that wearing or carrying a deadly weapon openly with intent to injure[58] does not merge into robbery with a deadly weapon under either the required evidence test or the rule of lenity.[59] Similarly, in *Biggus v. State*,[60] the Court of Appeals refused to allow a merger of such a weapons offense with a sex offense. In *Biggus*, the defendant was convicted of a weapons charge under section 36(a) and a third degree sex offense involving sex with a minor.[61] The court determined that the offenses should not be merged under the required evidence test or under the rule of lenity because the legislature intended to treat weapons violations harshly.[62]

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50. *Id.* at 510, 540 A.2d at 1133.

51. *See id.* (holding that the § 36B(b) offense merged into the § 36B(d) offense).

52. 288 Md. 137, 416 A.2d 265 (1980).

53. *See supra* note 47 (setting forth the relevant text of Article 27, § 36B(d)).

54. *Whack*, 288 Md. at 139, 416 A.2d at 266.

55. *Id.* at 149, 416 A.2d at 271.

56. *See* MD. ANN. CODE art. 27, § 36(a) (1992).

57. 76 Md. App. 201, 544 A.2d 14 (1988), *aff'd on other grounds*, 319 Md. 174, 517 A.2d 1236 (1990).

58. Although the defendant in *Selby* carried a weapon concealed and openly, he was not charged with carrying a concealed weapon. *See Selby*, 319 Md. at 175, 571 A.2d at 1237. Thus, the Article 27, § 36(a) merger question did not arise. *See Selby*, 76 Md. App. at 201, 544 A.2d at 14.

59. *Selby*, 76 Md. App. at 218-19, 544 A.2d at 23.

60. 323 Md. 339, 593 A.2d 1060 (1991).

61. *Id.* at 344-45, 593 A.2d at 1062-63.

62. *Id.* at 356-57, 593 A.2d at 1068-69. In particular, the court cited the following excerpt from Article 27, § 36(a): "[I]n case of conviction, if it shall appear from the evidence that such weapon was carried, concealed or openly, with the deliberate purpose of injuring

The court also inferred a legislative intent against merger by noting that the legislature had not reacted to Maryland courts' universal refusal to merge section 36(a) convictions into other offenses[63]—except when mandated to do so by statute or the required evidence test.[64] In *Biggus,* however, the underlying crime, a third degree sex offense, was not based solely on the use of a dangerous or deadly weapon, but also involved the defendant's contact with a victim under fourteen years of age.[65] Had the second offense been based solely on weapons use, the court may have merged the section 36(a) conviction into the sex offense conviction.[66]

3. The Court's Reasoning.—

a. The Weapons Convictions.—In *Eldridge,* the court first determined whether a court could impose separate sentences for carrying a concealed dangerous or deadly weapon and for carrying the same weapon openly with intent to injure.[67] To discern the legislative intent behind Article 27, section 36(a), the dangerous and deadly weapons statute, the court began by examining its earlier holding in *Webb.*[68] It determined that, based on the similarity between the handgun statute at issue in *Webb*[69] and the dangerous or deadly weapons statute at issue in *Eldridge,* section 36(a) was the counterpart of the handgun statute.[70] Thus, the court concluded that the activities prohibited by section 36(a) constitute one offense.[71] It further reasoned

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the person or destroying the life of another, the court shall impose the highest sentence of imprisonment prescribed." *Id.* at 356, 593 A.2d at 1068 (citing MD. ANN. CODE art. 27, § 36(a) (1992)).

63. *Id.* at 357, 593 A.2d at 1069; *see* Brooks v. State, 284 Md. 416, 422-24, 397 A.2d 598, 599-600 (1979) (stating that the crime of carrying a deadly weapon openly with intent to injure does not merge into assault with intent to murder because it fails the required evidence test). The *Brooks* court discussed the rule of lenity without naming it. *See id.* It stated that the appellant had not argued that the legislature intended merger, so the issue was not before the court. *Id.* at 423-24, 397 A.2d at 600; *see also* Nance v. State, 77 Md. App. 259, 267, 549 A.2d 1182, 1185-86 (1988) (holding that a weapons conviction under Article 27, section 36(a) does not merge into first degree rape and first degree sex offenses). The *Nance* court stated that the elements of the particular weapons offense at issue were the carrying of the weapon, openly and with intent to injure. *See id.* at 265, 549 A.2d at 1185. Therefore, these offenses failed to satisfy the required evidence test. *Id.* at 266, 549 A.2d at 1185.

64. *Biggus,* 323 Md. at 357, 593 A.2d at 1069.

65. *Id.* at 354, 539 A.2d at 1067.

66. *Id.*

67. *See Eldridge,* 329 Md. at 312-13, 619 A.2d at 534.

68. *See supra* notes 37-45 and accompanying text.

69. *See* MD. ANN. CODE art. 27, § 36B (1992).

70. *Eldridge,* 329 Md. at 314, 619 A.2d at 535.

71. *Id.*

that applying the Court of Special Appeals's view—that carrying the weapon concealed is a separate offense from carrying it openly—would result in the absurd imposition of a new sentence every time a defendant moved a weapon in and out of open view.[72] According to the court, common sense dictated that the intent of the legislature was to make these weapons offenses one crime.[73] The prohibition against double jeopardy prohibited the imposition of multiple punishments for violations of the statute that arose from the same transaction.[74]

b. The Merger of the Weapons Charges into Robbery with a Dangerous or Deadly Weapon.—Finding that the violation of Article 27, section 36(a) was a single offense, the court determined that regardless of which of the two weapons convictions it formally vacated, the remaining offense would merge into the conviction for robbery with a dangerous or deadly weapon.[75] Once again, the court looked to its holding in a handgun case—this time to *Whack*—to determine whether to merge the two offenses.[76] The court first noted that, unlike the handgun statute, which makes use of a handgun during the commission of a felony a separately punishable offense, there is no express indication that the legislature intended section 36(a) to be separately punishable.[77] The court also noted that the twenty-year maximum sentence for robbery with a deadly weapon was already an enhanced penalty[78] and concluded that the legislature did not intend multiple punishments in this case.[79]

Finally, the *Eldridge* court briefly explained the relationship between legislative intent and the required evidence test to show why it permitted multiple sentences in *Whack*.[80] The court explained that although the required evidence test is the general rule for determining whether to merge two criminal violations, it "is not the only standard for determining when two statutory violations are [the same] . . .

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72. *Id.* at 314-15, 619 A.2d at 535.

73. *Id.* at 315, 619 A.2d at 535.

74. *See id.*

75. *See id.*

76. *See supra* notes 52-55 and accompanying text.

77. *Eldridge*, 329 Md. at 317-19, 619 A.2d at 536-37.

78. *See id.* at 316, 619 A.2d at 536 ("It offends common sense to believe that the legislature, already punishing the robber for using a deadly weapon, contemplated that the robber could receive an additional term of imprisonment because he carried the weapon used in the robbery."). The maximum penalty for robbery is 10 years, MD. ANN. CODE art. 27, § 486A (1992), while the maximum penalty for robbery with a deadly weapon is 20 years. *Id.* § 488.

79. *Eldridge*, 329 Md. at 320, 619 A.2d at 538.

80. *Id.* at 319, 619 A.2d at 537.

," as "[t]he imposition of multiple punishment . . . is often particularly dependent upon the intent of the legislature."[81] In *Whack*, for example, the court's decision to allow multiple punishment was based on legislative intent.[82] It is not entirely clear in either *Whack* or *Eldridge*, however, whether the Court of Appeals considered the weapons offenses and the underlying crimes at issue "the same" under the required evidence test.[83]

4. Analysis.—The Court of Appeals's holding in *Eldridge*, that violations of Article 27, section 36(a) arising from the same transaction constitute a single offense and must merge into a robbery with a deadly weapon conviction, was well reasoned.[84] The court's first holding, that the prosecution for a single deadly weapons offense may be based on the wearing, transporting, and carrying of the weapon, stemmed from the court's determination of the legislative intent as to the definition of the offense.[85] Because the legislature had not made its intent clear, the court looked to its holding in *Webb*, which defined the "unit of prosecution" under a similar handgun statute, to ascertain the intent of the legislature with regard to the deadly weapons statute.[86]

The court's second holding, that the weapons conviction merged into the robbery with a deadly weapon conviction, was, in light of the court's first holding, logically inevitable. Based on the required evidence test, and given that the unit of prosecution of the dangerous or deadly weapons offense consisted of wearing and carrying the weapon, the court correctly held that, because the legislature did not explicitly provide to the contrary, the weapons conviction must merge into the conviction for robbery with a dangerous or deadly weapon.[87] In support of its decision, the court again turned to a handgun-merger case, this time to distinguish between the clear legislative directive for multiple punishments in the case of handguns violations, and the legislative silence with respect to punishments for dangerous and deadly weapons offenses.[88]

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81. *Id.*

82. *See* Whack v. State, 288 Md. 137, 143, 416 A.2d 265, 268 (1980).

83. *See id.* at 149 n.5, 416 A.2d at 271 n.5 (noting different views of the required evidence test).

84. *See Eldridge*, 329 Md. at 313-14, 619 A.2d at 534-35.

85. *See id.*

86. *See supra* notes 68-71 and accompanying text.

87. *Eldridge*, 329 Md. at 315, 619 A.2d at 535.

88. *See supra* notes 76-77 and accompanying text.

The reason for the court's search for legislative intent, however, is unclear. It could have undertaken this analysis for either of two reasons: to determine if multiple punishments were intended even if the offenses would merge under the required evidence test, or because the court considered the offenses separate but read the rule of lenity as mandating a resolution in favor of the defendant. Because the court did not explicitly state that the two offenses passed the required evidence test, it is impossible to know which of the two reasons motivated the court.

This ambiguity may pose a problem in future cases involving two offenses that are closely related but do not merge under the required evidence test. While the court has reiterated its interpretation of the rule of lenity on several occasions,[89] it might have alleviated the confusion as to when the rule applies by responding directly to the Court of Special Appeals's decision in *Eldridge*. Because the court did not specify whether it considered the offenses at issue the same, merger could have resulted under either the required evidence test or the rule of lenity—or, in other words, under either the narrow or broad interpretation of the rule of lenity. Given the disagreement in Maryland surrounding the rule of lenity, it would have been helpful for the court to respond directly to the Court of Special Appeals's statement that the offenses did not merge *because* they were not the same under the required evidence test.

5. Conclusion.—While the Court of Appeals has, for the first time, clearly ruled on merger issues surrounding Article 27, section 36(a) violations, its decision in *Eldridge* will offer little guidance in other merger cases. The controversy over the correct application of the rule of lenity will continue. *State v. Lancaster*,[90] decided eight months after *Eldridge*, sets out in a footnote the relationship between the required evidence test and the rule of lenity.[91] Its discussion, however, differs very little from that in *White v. State*[92]—in fact, it cites *White* as a guide.[93] Yet, as seen in the Court of Special Appeals's opinions in *Mauk* and *Eldridge*,[94] a narrower vision of the rule of lenity survived *White*. It remains to be seen whether the *Eldridge* court's fail-

89. *See supra* notes 25-34 and accompanying text.

90. 332 Md. 385, 631 A.2d 453 (1993); *see also supra* notes 35-36 and accompanying text.

91. *Lancaster*, 332 Md. at 413 n.16, 631 A.2d at 468 n.16.

92. 318 Md. 740, 569 A.2d 1271; *see also supra* notes 27-30 and accompanying text.

93. *See Lancaster*, 332 Md. at 413 n.16, 631 A.2d at 468 n.16.

94. *See supra* notes 10-14, 31-33 and accompanying text.

ure to address this dispute directly will render *Lancaster* as inconclusive as *White*.

RITA PAZNIOKAS

VI. ENVIRONMENTAL LAW

A. *Simultaneous Expansion and Limitation of Environmental Response Cost Recovery Under Comprehensive General Liability Insurance Policies*

In *Bausch & Lomb Inc. v. Utica Mutual Insurance Co.*,[1] the Court of Appeals disregarded prior interpretations of Maryland law and held that environmental response costs constituted recoverable "damages" under a standard comprehensive general liability (CGL) insurance policy.[2] It limited the ability of insureds to recover such costs, however, by refusing to overturn precedent indicating that preventive actions by policyholders are not covered[3] and ruling that the State does not have a property interest in the groundwater within its borders.[4] Because CGL policies only cover damages to third parties,[5] the lack of a property interest on the part of the State means that another third party property interest holder must bring suit against the insured before coverage will be triggered.

1. The Case.—In 1965, Bausch & Lomb (B & L) purchased the Diecraft facility, located in Sparks, Maryland, to machine and plate telescope and microscope parts.[6] Although B & L's techniques for disposing of the plating wastes conformed with common industry practice, they resulted in the deposit of heavy metals in the soil.[7] B & L discovered the deposits in a soil analysis it conducted in November 1982.[8] In February 1983, it notified the United States Environmental Protection Agency (EPA) of the contamination.[9] Seven months later, B & L hired Fred C. Hart & Associates (Hart), an environmental consulting firm, to test the site further and to make remedial sugges-

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1. 330 Md. 758, 625 A.2d 1021 (1993).
2. *Id.* at 782, 625 A.2d at 1033.
3. *Id.* at 789, 625 A.2d at 1036.
4. *Id.* at 788, 625 A.2d at 1036.
5. *Id.* at 783, 625 A.2d at 1033.
6. Utica Mut. Ins. Co. v. Bausch & Lomb Inc., 91 Md. App. 1, 7, 603 A.2d 1241, 1244 (1992), *aff'd in part, modified in part*, 330 Md. 758, 625 A.2d 1021 (1993).
7. *Bausch & Lomb*, 330 Md. at 766, 625 A.2d at 1025. For 17 years, B & L deposited plating wastes at the Diecraft facility into either a holding lagoon or a set of drywells, depending on the wastes' concentration. *Id.*
8. *Utica*, 91 Md. App. at 7, 603 A.2d at 1244.
9. *Bausch & Lomb*, 330 Md. at 766, 625 A.2d at 1025. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) required B & L to report the contamination. 42 U.S.C. § 9603(a) (1980). Section 103(a) of CERCLA requires the reporting of hazardous releases in excess of federally permissible amounts. *Id.*

tions.[10] Hart discovered in mid-1984 that, in addition to the pollution of Diecraft's soil by heavy metals, the groundwater underneath the site was contaminated by trichloroethylene (TCE).[11]

At approximately the same time that Hart's testing revealed the heavy metal and TCE contamination, the State Waste Management Administration listed the Diecraft facility as a potentially hazardous site in the August 31, 1984 edition of the *Maryland Register*.[12] In November 1985, Hart reported the TCE contamination to B & L.[13] The State and B & L entered into a "cooperative arrangement" in July 1986.[14] B & L agreed to test and clean up the site, and the State agreed to receive, review, and comment on the tests and remediation plans prepared for B & L by Hart.[15]

In June 1987, B & L received a letter from Highlands Park I Limited Partnership (Highlands Park), the owner of the adjacent parcel of land, claiming TCE contamination of the ground and surface water under its property and threatening to sue.[16] B & L notified its insurer, Utica,[17] of the potential claim and requested approximately $76,000 in reimbursement for the testing completed to date at the Diecraft facility.[18] Utica refused to extend coverage until it reviewed the mat-

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10. *Utica*, 91 Md. App. at 7-8, 603 A.2d at 1244.

11. *Id.* at 8, 603 A.2d at 1244. TCE, an organic solvent, contaminated the groundwater near the disposal site and a small stream that ran onto an adjacent parcel of land. *Bausch & Lomb*, 330 Md. at 767, 625 A.2d at 1025.

12. *Bausch & Lomb*, 330 Md. at 768, 625 A.2d at 1026. The agency named the Diecraft facility as a potentially hazardous site based on the information B & L supplied EPA. *Id.* In August 1985, the agency decided to conduct a preliminary assessment of the Diecraft facility. State officials completed the preliminary assessment in December 1985. *Id.* at 768-69, 625 A.2d at 1026.

13. *Id.* at 767, 625 A.2d at 1025.

14. *Id.* at 769, 625 A.2d at 1026.

15. *Id.* The State neither sued B & L nor ordered it to clean up the site. *Id.* at 770, 625 A.2d at 1027.

16. *Id.* at 767, 625 A.2d at 1025-26.

17. Although more than four years had elapsed since B & L learned of the site contamination, this was its first attempt to notify Utica that it expected reimbursement for its environmental response costs. *Id.* at 767-68, 789, 625 A.2d at 1026, 1036.

18. *Id.* at 767, 625 A.2d at 1026. Utica issued B & L a CGL policy annually from approximately 1970 to 1986. *Id.* at 764, 625 A.2d at 1024. A CGL policy is a third party policy whereby the insurer promises to pay damages to third parties who are injured, or who have an interest in property that is injured, as a result of the insured's acts or omissions. KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 23-24 (1991). The relevant language of B & L's policy provided that

> [t]he company [Utica] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage.

Bausch & Lomb, 330 Md. at 764, 625 A.2d at 1024.

ter further.[19] B & L subsequently sold the Diecraft facility, but retained responsibility for the site's environmental liabilities.[20] After further investigation, Utica denied coverage, and on November 20, 1987, filed suit in Baltimore County Circuit Court seeking a declaratory judgment that it had no obligation to defend or to indemnify B & L.[21]

The trial court denied Utica's declaratory judgment and ruled that it must pay for present and future clean-up costs[22] and defend B & L against third party property damage claims.[23] In addition, it awarded B & L costs, expenses, and attorneys' fees.[24] The court limited the award, however, by holding that Utica had no duty to pay monitoring and testing expenses.[25] The parties cross-appealed to the Court of Special Appeals, which held that Utica was not liable for any of B & L's costs and had no duty to defend B & L.[26] Following the reasoning of the decisions in *Maryland Cup Corp. v. Employers Mutual Liability Insurance Co.*[27] and *Maryland Casualty Co. v. Armco, Inc.*,[28] the court concluded that reimbursement of clean-up costs was a form of equitable relief and not "damages" within the meaning of the CGL policy.[29] Furthermore, the court found that because B & L's clean-up measures were preventive in nature and the State did not have a property interest in the groundwater, there was no third party property damage as required under the CGL policy.[30] The Court of Appeals

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19. *Bausch & Lomb*, 330 Md. at 768, 625 A.2d at 1026.

20. *Id.* As part of the sales agreement, B & L reserved up to $1 million of the purchase price for environmental clean-up costs at the facility. *Id.*

21. *Id.* at 770, 625 A.2d at 1027. B & L counterclaimed for breach of contract and asserted that "Utica failed to provide [it] with full investigation, defense, and indemnification, as required by the policy." *Id.* at 771, 625 A.2d at 1027.

22. The court restricted future clean-up costs to claims where the State required remedial action and to claims involving potential liability. *Id.* at 771-72, 625 A.2d at 1028.

23. *Id.*

24. *Id.* at 773, 625 A.2d at 1028.

25. *Id.* at 772, 625 A.2d at 1028.

26. Utica Mut. Ins. Co. v. Bausch & Lomb Inc., 91 Md. App. 1, 10, 603 A.2d 1241, 1245 (1992), *aff'd in part, modified in part*, 330 Md. 758, 625 A.2d 1021 (1993).

27. 81 Md. App. 518, 568 A.2d 1129 (1990); *see infra* notes 47-48 and accompanying text.

28. 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *see infra* notes 41-46 and accompanying text.

29. *Utica*, 91 Md. App. at 20, 603 A.2d at 1250.

30. *Id.* at 15-16, 603 A.2d at 1248-49. The court relied on W.M. Schlosser Co. v. Insurance Co. of North America, 325 Md. 301, 600 A.2d 836 (1992), in holding that preventive measures are not covered under CGL polices. *See Bausch & Lomb*, 325 Md. at 18-19, 603 A.2d at 1249.

granted certiorari to determine whether environmental response costs[31] constitute "damages" under a CGL policy.[32]

2. Legal Background.—

a. Interpretation of Insurance Contracts Under Maryland Law.— Several well-established principles govern the construction of insurance contracts in Maryland. The contract is measured by its terms and construed as a whole to determine the intention of the parties.[33] Rather than following the rule that an insurance policy is to be construed against the insurer,[34] Maryland courts examine "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution."[35] To establish the character and purpose of the contract, words are accorded their ordinary and accepted meaning—the meaning a reasonably prudent layperson would attach to them.[36] If the language of the contract is general and would suggest two possible meanings to a reasonably prudent layperson, extrinsic or parol evidence is admitted to determine the intention of the parties and whether the ambiguous language has a trade usage.[37] If the language of the contract remains ambiguous, it is construed against the insurer as drafter of the instrument.[38]

b. Determination of What Constitutes "Damages" in Maryland.— Before *Bausch & Lomb*, courts interpreting Maryland law consistently

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31. Environmental response costs in this case refer to the costs B & L incurred in testing and cleaning up the Diecraft facility.

32. *Bausch & Lomb*, 330 Md. at 775, 625 A.2d at 1029.

33. Pacific Indem. Co. v. Interstate Fire & Casualty Co., 302 Md. 383, 388, 488 A.2d 486, 488 (1985); *see also* Lloyd E. Mitchell, Inc. v. Maryland Casualty Co., 324 Md. 44, 56, 595 A.2d 469, 475 (1991) (stating that the application of the terms of the contract is the primary principle of insurance policy construction). A contract is not measured by its terms, however, when so doing would violate a statute, regulation, or public policy. *Pacific Indem.*, 302 Md. at 388, 488 A.2d at 488.

34. Several jurisdictions regularly construe insurance policies against the insurer. *See, e.g.*, Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1182 (N.D. Cal. 1988), *aff'd in part, rev'd in part*, 952 F.2d 1551 (9th Cir. 1991) ("[A]n insurance contract, like any other contract, is construed against the party who prepared the document."); Midwest Dairy Prod. Corp. v. Ohio Casualty Ins. Co., 190 N.E. 702, 703 (Ill. 1934) ("Insurance contracts should be liberally construed in favor of the insured.").

35. *Pacific Indem.*, 302 Md. at 388, 488 A.2d at 488.

36. *Id. See, e.g.*, Cheney v. Bell Nat'l Life Ins. Co., 315 Md. 761, 766, 556 A.2d 1135, 1138 (1989); *Lloyd E. Mitchell*, 324 Md. at 56, 595 A.2d at 475.

37. *Pacific Indem.*, 302 Md. at 389, 488 A.2d at 489.

38. *Cheney*, 315 Md. at 767, 556 A.2d at 1138; *see also* Mutual Fire, Marine & Island Ins. Co. v. Vollmer, 306 Md. 243, 251, 508 A.2d 130, 134 (1986).

held, with one apparent exception,[39] that an insurance claim requesting equitable relief did not constitute "damages" under a standard CGL policy.[40] The United States Court of Appeals for the Fourth Circuit, in *Maryland Casualty Co. v. Armco, Inc.*,[41] held that under a CGL policy, environmental response costs[42] constituted a form of equitable relief for which the insurance company was not obligated to indemnify and reimburse the policyholder.[43] Although the court recognized that "[i]t is black-letter law that the terms of an insurance policy are to be construed according to the meaning a reasonably prudent layman would infer," it exempted the term "damages" from this rule.[44] The court stated that "Maryland law . . . has . . . adopted the somewhat narrow, technical definition of damages,"[45] and thus "damages" refers only to payments made to third persons seeking legal, as opposed to equitable, relief.[46]

The Maryland Court of Special Appeals adopted the reasoning of *Armco* in *Maryland Cup Corp. v. Employers Mutual Liability Insurance Co.*[47] There, the court found that complaints filed with the Equal Employment Opportunity Commission and in a Title VII suit sought noncompensatory remedies and thus were not "damages" as defined by the insurance policy.[48] Both the *Armco* and *Maryland Cup* courts concluded that if the term "damages" were interpreted to include nonlegal damages, any obligation to pay would be covered and the term would become surplus language in the insurance contract.[49]

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39. In Chesapeake Utils. Corp. v. American Home Assur. Co., 704 F. Supp. 551, 560 (D. Del. 1988), the court applied Maryland law and denied the insurer's motion for summary judgment on the grounds that a "reasonably prudent layperson" would not distinguish between damages at law and equity. The court concluded, as a matter of law, that the term "damages" did not exclude environmental clean-up costs. *Id.* at 561.

40. *See infra* notes 41-49 and accompanying text.

41. 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

42. In *Armco*, the environmental response costs at issue were the costs of reimbursing the federal government pursuant to CERCLA § 107(a) for engineering and clean-up costs. *Id.* at 1352.

43. *Id.* at 1354.

44. *Id.* at 1352.

45. *Id.* (citing Haines v. St. Paul Fire & Marine Ins. Co., 428 F. Supp. 435 (D. Md. 1977)).

46. *Id.*

47. 81 Md. App. 518, 568 A.2d 1129 (1990). The United States District Court for the District of Maryland also has adopted the *Armco* rationale. *See* Travelers Indem. Co. v. Allied-Signal Inc., 718 F. Supp. 1252 (D. Md. 1989) (concluding that *Armco* dictated its decision that environmental response costs did not constitute "damages").

48. *Maryland Cup*, 81 Md. at 527, 568 A.2d at 1134.

49. *Armco*, 822 F.2d at 1352; *Maryland Cup*, 81 Md. App. at 524, 568 A.2d at 1132.

c. Other Jurisdictions.—The majority of state appellate courts have held that CGL policies cover environmental response costs, but federal courts are split on the issue.[50] Two cases are illustrative of the division in the federal courts. In the first, *Intel Corp. v. Hartford Accident and Indemnity Co.*,[51] a federal district court held that costs incurred in cleaning up contaminated groundwater constituted "damages" within the scope of CGL policy coverage.[52] By employing a statutory definition of "damages,"[53] the court concluded that the State and citizens of California had "suffered a detriment from the unlawful acts or omissions of Intel and [were] entitled to damages as a result."[54] The court rejected the legal/equitable distinction as a "tautology defining damages as payment to a person who 'has a legal claim for damages.'"[55] In the second case, *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co.*,[56] the United States Court of Appeals for the Eighth Circuit held that environmental response costs did not constitute "legal damages" and thus were not covered under the insured's CGL policy.[57] The court reasoned that, when used in an insurance context, the term "damages" was unambiguous and plainly meant "legal damages."[58]

3. The Court's Reasoning.—In *Bausch & Lomb*, the Court of Appeals applied the general rules of insurance contract interpretation to the relevant language of B & L's CGL policy.[59] Specifically, the court examined three phrases in the policy: "shall become legally obligated to pay"; "as damages"; and "because of . . . property damage to which this insurance applies."[60]

In examining the phrase "shall become legally obligated to pay," the court found that, although the State did not act in an adversarial

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50. *Bausch & Lomb*, 330 Md. at 777-78, 625 A.2d at 1030-31.

51. 692 F. Supp. 1171 (N.D. Cal. 1988), *aff'd in part and rev'd in part*, 952 F.2d 1551 (9th Cir. 1991).

52. *Id.*

53. California Civil Code section 3281 states that "[e]very person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor [sic] in money, which is called damages." CAL. CIV. CODE § 3281 (West 1970).

54. *Intel Corp.*, 692 F. Supp. at 1189.

55. *Id.* at 1187 n.21 (quoting Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987).

56. 842 F.2d 977 (8th Cir.) (en banc), *cert. denied*, 488 U.S. 821 (1988).

57. *Id.*

58. *Id.* at 985.

59. *Bausch & Lomb*, 330 Md. at 779, 625 A.2d at 1031.

60. *Id.* at 779-83, 625 A.2d at 1031-33.

manner towards B & L,[61] the State's regulatory activities compelled the company to test the site and adopt and implement a remediation program to clean up the contaminated soil and groundwater.[62] Thus, the court concluded that "B & L's response costs, undertaken in the regulatory context, represented a sum the corporation was legally obligated to pay."[63]

Under the second inquiry, the court noted that the term "damages" was not listed in the policy's definition section, nor was there any indication in the contract that Utica and B & L wanted it defined in any special or technical manner.[64] Therefore, the court interpreted "damages" as a reasonably prudent layperson would in daily life.[65] By consulting both Webster's dictionary and an insurance dictionary, the court determined that the trial court was correct in defining damages as "'anything that a third party can make you pay for because of damage to that third party's property.'"[66] The court concluded that in *Armco*, the Fourth Circuit "misperceive[d] the law of Maryland" by giving the term "damages" a legal, technical meaning, because "[t]he reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity."[67] Thus, the court concluded that although reimbursement for environmental response costs was a form of equitable relief, it was included within the definition of the term "damages."[68]

The last phrase the court concentrated on was "because of . . . property damage to which this insurance applies."[69] The CGL policy contained an "own property" exclusion[70] and, therefore, insured only against injury to third party property.[71] As a result, the court had to determine whether the State of Maryland possessed a property interest in the contaminated groundwater.[72] The court found that case law and the original Charter to Lord Baltimore established that the State is a quasi-trustee for the public of all navigable waters within the

61. *See supra* note 15.
62. *Bausch & Lomb*, 330 Md. at 780, 625 A.2d at 1032.
63. *Id.*
64. *Id.* at 780, 625 A.2d at 1032.
65. *Id.* at 781, 625 A.2d at 1032.
66. *Id.*
67. *Id.* at 781-82, 625 A.2d at 1032-33.
68. *Id.* at 782, 625 A.2d at 1033.
69. *Id.* at 783, 625 A.2d at 1033.
70. *Id.* at 765, 625 A.2d at 1024. The "own property" provision excluded coverage for "property damage to property owned by, occupied by, rented to, used by, or in the care, custody, or control of the insured." *Id.*
71. *Id.* at 783, 625 A.2d at 1033.
72. *Id.*

State.[73] The court distinguished surface waters from groundwaters, however, and held that this body of law did not apply to groundwater.[74] Thus, the extent of the State's interest in groundwater, as it relates to standard CGL policies, was a question of first impression.[75]

After examining various sections of the Natural Resources and Environment Articles of the Code,[76] the court concluded that the State maintained a regulatory and conservatory interest, rather than a property interest, in the groundwater.[77] Relying on two Supreme Court cases,[78] the court also dismissed the state ownership theory as a "legal fiction."[79] It then concluded that because no third party incurred property damage, B & L could not recover its environmental response costs under its CGL policy.[80]

4. Analysis.—The court's holding in *Bausch & Lomb* simultaneously expanded and limited the ability of insureds to recover environmental response costs under CGL policies. The inclusion of equitable claims in the definition of damages broadened the types of costs that are reimbursable under CGL policies, but preventive measures appear to remain uncovered.[81] As a result, reimbursement may still be substantially limited for environmental response claims. In addition, by holding that the State does not have a property interest in groundwater, the court effectively prohibited future policyholders from re-

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73. *Id.*

74. *Id.* at 784, 625 A.2d at 1034. The court defined the groundwater under the Diecraft facility as "percolating waters . . . 'which ooze, seep or filter through soil beneath the surface, without a defined channel, or in a course that is unknown and not discoverable from surface indications.'" *Id.* (quoting Finley v. Teeter Stone, Inc., 251 Md. 428, 248 A.2d 106 (1968)).

75. *Id.* at 784-85, 625 A.2d at 1034.

76. *See id.* at 785-86, 625 A.2d at 1034-35.

77. *Id.* at 788, 625 A.2d at 1036. B & L based its argument that the State had a property interest in the groundwater on statutory references to "waters of the State" and "State waters." The court rejected the argument and explained that the phrases were "simply generic usage addressing the location of waters within State borders . . . ." *Id.* at 786, 625 A.2d at 1035.

78. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982); Hughes v. Oklahoma, 441 U.S. 322 (1979). These decisions emphasized that states do not "own" their natural resources; rather, they maintain a regulatory and preservationist interest in those natural resources. *See Sporhase*, 458 U.S. at 951; *Hughes*, 441 U.S. at 334.

79. *Bausch & Lomb*, 330 Md. at 787, 625 A.2d at 1035-36. *But see* Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180, 1187 (recognizing the "state and federal governments' . . . 'interest . . . independent of . . . its citizens in all the earth and air within [their] domain'" (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)), *reh'g granted*, 815 F.2d 51 (8th Cir. 1987), *aff'd in part, rev'd in part*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied*, 488 U.S. 821 (1988).

80. *Bausch & Lomb*, 330 Md. at 788, 625 A.2d at 1036.

81. *Id.* at 789, 625 A.2d at 1036.

covering their groundwater clean-up costs unless a third party property interest holder files a claim against the policyholder.

a. The Expansion of Recovery Available Under CGL Policies.— The court's abolishment of the legal/equitable distinction in damages claims brought environmental cleanups within standard CGL coverage. In fact, one commentator has called the holding "a major victory for Maryland policyholders . . . ."[82] The extent of the victory, however, is unclear, and insurance companies and policyholders alike may suffer from the uncertainty the holding could create in the insurance market. Conversely, the requirement that insurers pay environmental response costs may benefit Maryland citizens and the State Department of the Environment through reduced litigation.

By abolishing the legal/equitable distinction in CGL policies, the court may have assisted in both hastening environmental clean-up projects and lowering transaction costs by reducing the time spent litigating the issue of who should pay for the clean-up operation.[83] Expeditious cleanups benefit citizens in that they decrease the exposure time to hazardous substances.[84] Furthermore, the State may benefit economically from the reduction in litigation. The approximately 450 potentially hazardous sites in Maryland, for example, already have stretched the State Department of the Environment's resources to the limit.[85] Thus, whenever possible, the agency prefers to have the owner or operator[86] of the contaminated site involved in the clean-up

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82. Patty Reinert, *High Court Rules on Insurance Liability for Environmental Spills*, WARFIELD'S BUSINESS RECORD, May 21, 1993, § 1, at 4.

83. Four insurers surveyed by the RAND Corporation spent a combined $70 million on Superfund claims and related expenditures. Katherine N. Probst & Paul R. Portney, *Assigning Liability for Superfund Cleanups*, RESOURCES FOR THE FUTURE 23 (June 1992). Ninety percent of this money went to "defending their policyholders in legal actions with EPA, states, or other [potentially responsible parties], and for disputing (with these same policyholders) whether their policies covered the cleanup costs. . . . As for insurance coverage litigation, little can be done to reduce these transaction costs . . . at least until this issue reaches the highest court in each state and legal precedent is made clear." *Id.* at 23-24.

84. The Agency for Toxic Substances and Disease Registry recently reported that TCE, the chemical found in the groundwater at the Diecraft facility, has been linked to higher-than-average disease rates. *ATSDR Finds Higher-Than-Average Disease Rates Among People Exposed to TCE in Drinking Water*, Env't Rep. (BNA) No. 11, at 465 (July 16, 1993). For example, people exposed to TCE in drinking water reported high blood pressure, strokes, anemia and blood disorders, diabetes, kidney disease, urinary tract disorders, speech impairment, hearing difficulties, heart problems, skin rashes, and eczema. *Id.*

85. Telephone interview with Mark Cox, Chief of the Site Assessment Division, Maryland Department of the Environment (Oct. 14, 1993).

86. Section 7-201(x) of the Environment Article designates the party responsible for the pollution as the owner or operator of a site, regardless of negligence or other degree of fault. MD. CODE ANN., ENVIR. § 7-201(x) (1987).

operation.[87] The *Bausch & Lomb* holding that CGL policies cover environmental response costs will encourage owners and operators to cooperate with state agencies. If the court had distinguished between legal and equitable remedies for purposes of insurance coverage, owners and operators might have been tempted to wait for the State to clean up the sites. This process would needlessly expend scarce agency resources and delay the cleanup of contaminated sites.

While Maryland citizens and the State could benefit from expedited cleanups, insurance companies may perceive their liability for environmental response costs as excessively uncertain "judge made insurance."[88] Uncertainty is disadvantageous to the insurance industry because "[i]nsurance companies must be able to predict not only the number of claims that will be filed against the pool of insured businesses, but also the magnitude of the damages that will be awarded in each case."[89] If a judge extends coverage beyond what was predicted or intended, "[i]nsurers suffer an immediate financial loss, lose a measure of confidence in the fairness of the judicial system, and come to doubt their ability to predict future judicial developments."[90] To protect themselves financially, they begin to charge astronomical premiums or refuse to offer insurance to certain businesses.[91] If this occurs as a result of the *Bausch & Lomb* decision, it may not be the "major victory for Maryland policyholders"[92] that has been predicted.

b. Limitations on Recovery—Preventive Measures and Property Interests.—Although the court increased the breadth of coverage under

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87. Under § 7-222(a) of the Environment Article, the State can require a property owner or operator to remediate a polluted site. MD. CODE ANN., ENVIR. § 7-222(a) (1987). If the Secretary determines that the owner or operator will not clean up the site "properly and in a timely manner," the Secretary may use the State Hazardous Control Fund to remediate the polluted site. *Id.* §§ 7-220(a), 7-222(a), 7-222(a)(2)(i).

Mark Cox, Chief of the Site Assessment Division of the Maryland Department of the Environment, stated that the agency "always prefers to work with the site owner or operator," rather than remediate the property and then seek reimbursement from the owner or operator. Telephone interview with Mark Cox, Chief of the Site Assessment Division, Maryland Department of the Environment (Oct. 14, 1993). Furthermore, Maryland is one of three states involved in a pilot program under the Superfund Accelerated Cleanup Model, which explicitly states that the State should seek cooperation with the site owner or operator to encourage the owner or operator to remediate the site and facilitate cleanup. *Id.*

88. Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 960 (1988).

89. Daniel W. Pugh, Comment, *Insurer Liability for Environmental Clean-up: Do Contract Principles Excuse Performance?*, 48 BUS. LAW. 1707, 1722 (1993).

90. Abraham, *supra* note 88, at 961.

91. Pugh, *supra* note 89, at 1721.

92. *See supra* note 82 and accompanying text.

CGL policies, it did not mandate complete coverage. It did not overturn the current notion that preventive measures are not covered,[93] and by holding that the State does not have a property interest in groundwater,[94] it limited coverage under CGL policies to cases in which a third party brings suit for property damage.

B & L's actions were undertaken, in part, to prevent the further spread of TCE groundwater contamination on the neighboring parcel of land owned by Highlands Park.[95] In *W.M. Schlosser Co., Inc. v. Insurance Co. of North America*,[96] the Court of Appeals held that such costs, incurred in preventing harm to a third party's property, were not recoverable under a CGL policy because actual property damage had not occurred.[97] Its holding in *Bausch & Lomb* that the State does not have a property interest in the groundwater, combined with the fact that Highlands Park never filed a claim against B & L,[98] indicates that the court probably would have viewed B & L's actions as preventive and barred its claim for reimbursement under *Schlosser*.[99] Although environmental response costs associated with cleanups are now recoverable in Maryland under CGL policies, it still appears that they are not recoverable if undertaken to prevent, rather than clean up, damage to a third party's property.

The court's holding that the State does not have a property interest in the groundwater located within it[100] also restricted recovery of groundwater clean-up costs under CGL policies. As a result of the court's decision, if a policyholder contaminates the groundwater, it cannot recover its clean-up costs under a CGL policy unless a third party, other than the State, brings an action against it. Even if the State brings an action to recover its costs in cleaning up the contaminated groundwater, the policyholder cannot be reimbursed under its

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93. *See Bausch & Lomb*, 330 Md. at 789, 625 A.2d at 1036. The court concluded that because Highlands Park had not filed a claim against B & L, there was no reason to determine whether Utica would have been obligated to pay the costs of remediating the Diecraft facility in order to prevent future harm to Highlands Park's property. *Id.*

94. *Id.* at 788, 625 A.2d at 1036.

95. *But see* Brief for Respondent/Cross-Petitioner at 13 (arguing that B & L's actions should not be characterized as preventive because "Bausch and Lomb paid money to remedy environmental damage that *had already taken place* in response to an *existing* claim by the State of Maryland").

96. 325 Md. 301, 600 A.2d 836 (1992).

97. *Id.* at 306-07, 600 A.2d at 838.

98. *Bausch & Lomb*, 330 Md. at 789, 625 A.2d at 1036.

99. The Court of Special Appeals viewed B & L's actions as preventive and held that its environmental response costs were not recoverable under *Schlosser*. Utica Mut. Ins. Co. v. Bausch & Lomb Inc., 91 Md. App. 1, 18-20, 603 A.2d 1241, 1249-50 (1992), *aff'd in part, modified in part*, 330 Md. 758, 625 A.2d 1021 (1993).

100. *See Bausch & Lomb*, 330 Md. at 788, 625 A.2d at 1036.

CGL policy. This potential exposure to liability may benefit prevention efforts, but it also may discourage early cleanups by owners and operators. Policyholders who have polluted the groundwater may be tempted to wait until a third party brings suit to begin clean-up operations, thus ensuring that its CGL policy will cover the costs.

Although the court ruled that the State does not have a property interest in groundwater,[101] it neglected to explore the possibility that its citizens might have such an interest. As the court noted, section 1-302(c) of the Natural Resources Article "directs that State agencies must conduct their affairs as 'stewards of the air, land, [and] water. . . resources.'"[102] The plain meaning of "steward" is "a person who manages another's property . . . ."[103] Furthermore, section 8-801(a) states that it is the policy of the State to "conserve, protect, and use water resources of the State in accordance with the best interests of the people of Maryland . . . ."[104] These provisions would support a finding that the citizens of Maryland have a property interest in the state's groundwater. The United States District Court for the Northern District of California reached a similar conclusion in *Intel Corp. v. Hartford Accident and Indemnity Co.*[105] It held that "by polluting the ground water, [a company] ha[d] damaged the property of all Californians."[106] Although a California statute explicitly states that the people of California own all the water in the state,[107] public ownership of groundwater in Maryland could be inferred based on the "stewardship" and "best interests" language of the Natural Resources Article. The citizens of Maryland could then qualify as the injured third party capable

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101. *See id.*

102. *Id.* at 786, 625 A.2d at 1035 (citing MD. CODE ANN., NAT. RES. § 1-302(c) (1990)).

103. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1395 (unabr. ed. 1967).

104. MD. CODE ANN., NAT. RES. § 8-801(a) (1990).

105. 692 F. Supp. 1171 (N.D. Cal. 1988). Other courts have applied a similar rationale. *See* Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541, 1550 (S.D. Fla. 1987) (holding that "where the property damage alleged constitutes damage to the environment . . . that such property in truth belongs not to the Plaintiffs, but rather to the State and the citizens thereof . . . ."); Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. App. 1989) (holding that the contamination of the groundwater was compensable under the company's insurance policies because the groundwater belonged to the people of Puerto Rico, rather than to the company), *rev'd*, 476 N.W.2d 392 (1991); *cf.* Township of Gloucester v. Maryland Casualty Co., 668 F. Supp. 394, 399 (D.N.J. 1987) (endorsing the view that damage to groundwater constituted damage to a third party's property, as it "threaten[ed] harm to health, safety and welfare of the State of New Jersey" (quoting the complaint of the New Jersey Department of the Environment)), *summ. judgment granted*, 702 F. Supp. 1126 (1988).

106. *Intel*, 692 F. Supp. at 1183.

107. *Id.* Section 102 of the California Water Code states that "[a]ll water within the State is the property of the people of the State." CAL. WATER CODE § 102 (West 1971).

of bringing suit against policyholders for property damage. Further, the State's action against owners or operators of contaminated sites could be viewed as action on behalf of the citizens, triggering the necessary third party interest to invoke CGL liability coverage of the clean-up efforts of policyholders.

5. Conclusion.—By holding that environmental response costs are covered under CGL policies, the Court of Appeals in *Bausch & Lomb* expanded the breadth of coverage of CGL policies. The expansion was not complete, however, because preventive measures continue not to be covered. In addition, in the case of groundwater contamination, a policyholder cannot receive reimbursement under a CGL policy for clean-up costs unless a third party, other than the State, files a claim.

LAUREN C. MCKEEN

VII. EVIDENCE

A. *Upholding the Constitutionality of a Statutory Hearsay Exception*

In *Chapman v. State*,[1] the Court of Appeals held that admission of a bank's affidavit to establish dishonor of a check under a statutory hearsay exception did not violate the defendant's right to confrontation embodied in the Sixth Amendment and Article 21 of the Maryland Declaration of Rights.[2] The court determined that the evidence, admitted pursuant to Article 27, section 142(c) of the Code,[3] had sufficient "indicia of reliability" to satisfy constitutional requirements.[4] Accordingly, the court held that the State's failure to lay a foundation for the affidavit through in-court testimony or to establish the unavailability of any bank employee before admitting the affidavit did not violate the defendant's confrontation rights.[5] In so holding, the *Chapman* court expanded the test applied by the Supreme Court to determine the admissibility of hearsay. These alterations were unjustified because they materially narrowed the defendant's rights under the Confrontation Clause.[6]

1. The Case.—On April 19, 1988, John Vernon Chapman bought a color television and a maintenance service agreement for $315.49,

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1. 331 Md. 448, 628 A.2d 676 (1993).

2. *Id.* at 450, 628 A.2d at 677. All references to the Confrontation Clause or to confrontation rights refer to the rights contained in both the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights. The Court of Appeals has held that these provisions ensure "[t]he same right." Crawford v. State, 282 Md. 210, 211, 383 A.2d 1097, 1098 (1978).

3. Section 142(c) allows for admission of a bank affidavit to prove dishonor of a check, insufficient funds, or lack of an account, without compelling testimony of a bank employee. MD. ANN. CODE art. 27, § 142(c) (1992). The statute provides:

> Dishonor of a check by the drawee, that the drawer had no account with the drawee at the time of utterance, and insufficiency of the drawer's funds at the time of presentation and utterance may properly be proved by introduction in evidence of a notice of protest of the check, or of a certificate under oath of an authorized representative of the drawee declaring the dishonor, lack of account and insufficiency, and this proof shall constitute presumptive evidence of the dishonor, lack of account and insufficiency.

Id.

4. *Chapman*, 331 Md. at 450, 628 A.2d at 677.

5. *Id.* at 470-71, 628 A.2d at 688. The court also held that a typographical error on the face of the affidavit did not undermine its reliability so as to make it inadmissible at trial. *Id.* at 473-74, 628 A.2d at 689.

6. Adjustments to the rule against hearsay are legitimate only to the degree that they comport with Confrontation Clause scrutiny. *Id.* at 453-54, 628 A.2d at 679.

including tax, shipping and handling charges,[7] at the Sears, Roebuck & Co. catalogue store (Sears) in Bel Air, Maryland.[8] After verifying his identity, the assistant manager of the store, acting as a cashier, accepted a check from Chapman for the total purchase price.[9]

Sears delivered the check to its bank for deposit on the following day.[10] On April 21, 1988, the drawee, Fairfax Savings Bank, dishonored the check.[11] The depositary bank so notified Sears and returned the check to the store marked "DO NOT REDEPOSIT."[12] The face of the check was stamped to indicate that Chapman's account with Fairfax Savings Bank was closed.[13] After several unsuccessful attempts over the course of a year to contact Chapman at the address and telephone number printed on the check, Sears filed an "Application for Statement of Charges" on September 7, 1989.[14] Chapman was charged with Obtaining Property or Services by Bad Check under Article 27, section 141 of the Code.[15]

At Chapman's jury trial,[16] the State introduced the testimony of the assistant store manager, the dishonored check, and an affidavit from Fairfax Savings Bank, introduced under section 142(c), indicat-

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7. *Id.*

8. *Id.* at 451, 628 A.2d at 677.

9. *Id.* The assistant manager compared the signatures on the license and the check and the photo on the license with the man. *Id.* At trial, the assistant manager testified that between April 19, 1988, and the trial, Chapman appeared to have gained 75-100 pounds. Brief of Appellant at 3.

10. *Chapman*, 331 Md. at 451, 628 A.2d at 677.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Section 141 provides in pertinent part:

> A person is guilty of obtaining property or services by a bad check when:
>
> (a)(1) As a drawer or representative drawer, he obtains property or services by uttering a check knowing that he or his principal, as the case may be, has insufficient funds with the drawee to cover it and other outstanding checks;
>
> (2) He intends or believes at the time of utterance that payment will be refused by the drawee upon presentation; and
>
> (3) Payment is refused by the drawee upon presentation[.]

MD. ANN. CODE art. 27, § 141 (1992).

16. Before the trial began, Chapman filed a motion to dismiss based on the statute of limitations. Brief of Appellee at 2. In support of the motion, he argued that the maintenance agreement ($32.00) and the sales tax ($13.50) did "[n]ot come within the definition of obtaining services for purposes of the statute." Brief of Appellant at 9. When those two costs are subtracted from the $315.49 amount of the check, the remaining amount ($269.99) is less than $300.00, the amount required to make the offense a felony. *Id.* at 9-10; *see* MD. ANN. CODE art. 27, § 143(b) (1992) ("A person convicted of obtaining property or services by bad check when the property or services has a value of less than $300 is guilty of a misdemeanor . . . ."). Chapman asserted that since the statute of limitations for the misdemeanor was one year and the case was instituted more than fifteen months after the

ing that Chapman did not have an account with Fairfax Savings Bank on the date of the alleged incident.[17] Chapman objected to the affidavit's admission on two grounds: (1) that admission of the affidavit under section 142(c) was unconstitutional because it violated his right to confrontation; and (2) that, even if this type of hearsay was generally constitutional, an apparent irregularity on the face of the affidavit—the year on the face of the affidavit was incorrect[18]—undermined its reliability and mandated live testimony by the affiant.[19] Overruling the objections, the court admitted the affidavit,[20] and Chapman was convicted of the charges.[21] He appealed to the Court of Special Appeals, but before that court considered the case, the Court of Appeals granted certiorari on its own motion.[22] The court accepted the case to determine whether hearsay admitted under section 142(c) violates an accused's confrontation rights.[23]

2. *Legal Background.*—The Sixth Amendment[24] and Article 21 of the Maryland Declaration of Rights guarantee the right of defendants to confront the witnesses against them.[25] In the nineteenth century case of *Mattox v. United States*,[26] the Supreme Court articulated its vision for the Confrontation Clause as follows:

> The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the

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alleged incident, the case should be barred. Brief of Appellant at 10. He later repeated this argument before the Court of Appeals, but the court did not address it. *See id.* at 9-13.

17. *Chapman*, 331 Md. at 452, 628 A.2d at 678.

18. *Id.* at 473, 628 A.2d at 689.

19. *Id.* at 453, 628 A.2d at 678.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.* Deemed the Confrontation Clause, this provision was made applicable to the states through the Fourteenth Amendment in Pointer v. Texas, 380 U.S. 400, 403 (1965).

25. Article 21 provides in pertinent part: "[I]n all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . ." MD. CONST. DECL. OF RTS. art. 21.

26. 156 U.S. 237 (1895).

> manner in which he gives his testimony whether he is worthy of belief.[27]

The Confrontation Clause and the rule against hearsay are generally understood to safeguard "similar values."[28] While a state may develop new hearsay exceptions, the overlap between the hearsay rule and the Confrontation Clause subjects these alterations to Confrontation Clause scrutiny.[29] Any alteration in the rule against hearsay that materially erodes an accused's right to confrontation will be void.[30] In spite of the close relationship between hearsay rules and the Confrontation Clause, the Supreme Court has insisted that the Confrontation Clause is not merely a codification of the rules of hearsay.[31]

In the leading case on hearsay, *Ohio v. Roberts*,[32] the Supreme Court set forth a two-pronged test to determine when hearsay can be admitted without violating a defendant's confrontation rights.[33] Under the first prong, the prosecution must establish the necessity for the use of the hearsay evidence.[34] This standard requires that the state "either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[35] Once

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27. *Id.* at 242-43. More recently, the Supreme Court described the purpose of the Confrontation Clause as assuring three conditions of witness testimony: oath, personal presence, and cross-examination. *See* California v. Green, 399 U.S. 149, 158 (1970); 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 245, at 93 (4th ed. 1992). The Court of Appeals echoed this sentiment in Moon v. State, 300 Md. 354, 478 A.2d 695 (1984), stating that it is "[i]ndelibly clear that the essence of the Confrontation Clause is to secure the right of the defendant to have the witness against him produced in court." *Id.* at 368-69, 478 A.2d at 702.

28. *Green*, 399 U.S. at 155. The hearsay rule generally excludes a declarant's out-of-court statements when the statements are offered to prove the truth of the matter asserted. LYNN MCLAIN, MARYLAND EVIDENCE § 801.1, at 271 (1st ed. 1987). Exclusion under the hearsay rule, similar to a Confrontation Clause exclusion, is based on the "opponent's inability to cross-examine the declarant with regard to . . . perception, memory, sincerity, and narration." *Id.* (citations omitted).

29. *Chapman*, 331 Md. at 453-54, 628 A.2d at 679; *see also* Moon v. State, 300 Md. at 359, 478 A.2d at 698 ("[T]he Supreme Court's interpretation of the federal right to confrontation is binding upon this State.").

30. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 814 (1990) ("The Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule."); *Green*, 399 U.S. at 155-56 ("[W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.").

31. *See Wright*, 497 U.S. at 814.

32. 448 U.S. 56 (1980).

33. *Id.* at 65.

34. *Id.*

35. *Id.* The Court noted that for a witness to be considered unavailable, the prosecution must make a "'good faith effort to obtain his presence at trial.'" *Id.* at 74 (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968)).

the unavailability of a declarant is demonstrated, the second prong of the *Roberts* test requires that the out-of-court statement provide sufficient "indicia of reliability."[36] Sufficient reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[37] If the evidence does not fall within such an exception, it is inadmissible "absent a showing of particularized guarantees of trustworthiness."[38] Applying its two pronged test, the *Roberts* Court determined that admission of an unavailable declarant's prior testimony at a preliminary hearing to rebut the defendant's in-court testimony did not violate the defendant's right to confrontation.[39]

In a series of decisions since 1980, the Court has modified the *Roberts* standard. It initially diluted the *Roberts* necessity requirement in *United States v. Inadi*.[40] In *Inadi*, the Court held admissible an out-of-court statement of a defendant's coconspirator, even though the declarant was available but had not been produced.[41] Declaring that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable," the Court held that the *Roberts* unavailability requirement is inapplicable to coconspirator statements.[42] The Court then distinguished coconspirator statements from prior testimony.[43] It reasoned that while prior testimony is often "[o]nly a weaker substitute for live testimony," coconspirator statements have "independent evidentiary significance."[44] The *Inadi* Court further held that in coconspirator cases, the burdens imposed by the

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36. *Id.* at 66.

37. *Id.*; *see also* Bourjaily v. United States, 483 U.S. 171, 183 (1987) (stating that "no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception'") (citation omitted). "Firmly rooted" hearsay exceptions satisfy the reliability test "because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Idaho v. Wright, 497 U.S. 805, 817 (1990). The Supreme Court has identified seven hearsay exceptions as "firmly rooted": (1) excited utterances, White v. Illinois, 112 S. Ct. 736, 742 n.8 (1992); (2) statements made in the course of seeking medical treatment, *id.*; (3) coconspirator statements, Bourjaily v. United States, 483 U.S. 171, 183 (1987); (4) dying declarations, Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980); (5) cross-examined prior trial testimony, *id.*; (6) business records, *id.*, and (7) public records. *Id.*

38. *Roberts*, 448 U.S. at 66.

39. *Id.* at 77.

40. 475 U.S. 387 (1986).

41. *Id.* at 400.

42. *Id.* at 394.

43. *See id.* at 394-95.

44. *Id.* at 394. The Court stated that coconspirator statements are valuable in large part precisely because they are made away from court "[w]hile the conspiracy is in progress" and because they "provide evidence of the conspiracy's context that cannot be replicated . . . in court." *Id.* at 395.

unavailability rule on the prosecution and the entire criminal justice system outweigh any benefit gained by a defendant.[45]

In *White v. Illinois*,[46] the Court further qualified the *Roberts* unavailability standard, holding that both spontaneous declarations and statements made for the purposes of medical treatment are admissible even when an available declarant is not produced at trial.[47] In reaching this result, the Court again highlighted the independent evidentiary significance of the applicable hearsay exceptions.[48]

The Court addressed the "indicia of reliability" prong of *Roberts* in *Idaho v. Wright*.[49] In *Wright*, the Court held that statements made by a two-and-a-half year old alleged sexual assault victim were inadmissible.[50] In evaluating the evidence, which was admitted pursuant to Idaho's residual hearsay exception,[51] the Court held that the residual hearsay exception did not qualify as a "firmly rooted" hearsay exception.[52] Thus, the statements in question were "presumptively unreliable"[53] and could not be admitted "[a]bsent a showing of particularized

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45. *Id.* at 398-99. The Court surmised that requiring a showing of unavailability before a coconspirator's out-of-court statements could be admitted at trial would only slightly benefit the defendant since the defense is free to call any witness that would be helpful to its case. *See id.* at 397-98. The Court further noted that if it required that unavailability be proven, the court system would have the significant burden of adjudicating the additional issue of availability every time coconspirator statements were sought, *id.* at 398-99, and that the prosecution would have to transport incarcerated coconspirators from prison to the courthouse and remain continually aware of the whereabouts of unincarcerated coconspirators. *Id.*

46. 112 S. Ct. 736 (1992).

47. *Id.* at 743. The *White* Court believed that the decision in *Inadi* confined the unavailability requirement to prior testimony in a judicial proceeding and refused to extend this more narrow rule to *all* out-of-court statements. *Id.* at 741-42. However, the Court did not go so far as to claim that the *Roberts* unavailability requirement did not merit extension to *some* out-of-court statements. Rather, in taking pains to distinguish the applicable hearsay exceptions from prior testimony, the Court suggested that each out-of-court statement must be considered individually. *See id.* at 742-43.

48. *Id.* The Court explained that because a spontaneous statement is often made in a frenzied moment, without consideration of its consequences, it may be more persuasive than the same statement "offered in the relative calm of the courtroom." *Id.* Statements made when seeking medical treatment are similarly credible because declarants are aware that any misstatement may lead to the wrong treatment. *Id.* at 743.

49. 497 U.S. 805 (1990).

50. *Id.* at 827.

51. *See id.* at 817-22.

52. *Id.* at 817. The residual hearsay exception, or catchall exception, allows for admission of hearsay evidence that "is both necessary and also has circumstantial guarantees of trustworthiness, even though it does not fall within one of the established exceptions to the hearsay rule." MCLAIN, *supra* note 28, § 803(24).1, at 435; *see supra* note 27 and accompanying text.

53. *Wright*, 497 U.S. at 818 (quoting Lee v. Illinois, 476 U.S. 530, 543 (1986)).

guarantees of trustworthiness."[54] To be adequately trustworthy, the Court held that out-of-court statements must be "so trustworthy that adversarial testing would add little to [their] reliability."[55]

The *Wright* Court also rejected the State's assertion that "particularized guarantees of trustworthiness" could be established by the use of corroborative evidence.[56] The Court instead held that "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief."[57] "Hearsay evidence . . . must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[58]

3. The Court's Reasoning.—

a. "Indicia of Reliability" Requirement.—The *Chapman* court first addressed the reliability of the bank affidavit.[59] Recognizing that such evidence does not fit into any firmly rooted exception,[60] the court proceeded to search for "particularized guarantees of trustworthiness."[61] The court found several sufficient guarantees, including: (1) section 142(c)'s "close similarity to business and public records exceptions and the indicia of reliability associated with those exceptions";[62] (2) "[section] 142(c)'s adoption of familiar evidentiary principles";[63] (3) "the lack of any apparent motive to fabricate" on the part of the bank;[64] and (4) "the corroborative quality of the canceled check."[65]

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54. *Id.* (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

55. *Id.* at 821 (citing *Lee*, 476 U.S. at 544). This showing establishes that the hearsay evidence admitted under the residual hearsay exception is "at least as reliable as evidence admitted under a firmly rooted hearsay exception." *Id.* (citing *Roberts*, 448 U.S. at 66).

56. *Id.* at 822. The majority believed that allowing the use of corroborative evidence "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." *Id.* at 823. In *Wright*, the two-and-a-half year old girl's statements were corroborated by: (1) physical evidence that she had been sexually abused; (2) evidence that she was in the suspect's custody when injured; and (3) testimony by her older sister. *Id.* at 834 (Kennedy, J., dissenting).

57. *Id.* at 819.

58. *Id.* at 822. The majority asserted in dicta that the existence of corroborating evidence may suggest that any mistake in admitting the statement results only in harmless error. *Id.* at 823.

59. *Chapman*, 331 Md. at 456-67, 628 A.2d at 680-86.

60. *See supra* note 37 and accompanying text.

61. *Chapman*, 331 Md. at 456-57, 628 A.2d at 680-81.

62. *Id.* at 467, 628 A.2d at 686.

63. *Id.*

64. *Id.*

65. *Id.*

The court asserted that section 142(c) is a "direct derivative of the business records exception,"[66] a firmly rooted hearsay exception,[67] and that the rationale underlying the reliability of business records[68] applies in equal force to section 142(c).[69] Section 142(c) relaxed the traditional procedures for admitting bank records into evidence as business records in two ways: (1) by allowing the state to submit a summary (the affidavit) of the relevant information rather than requiring the admission of the actual bank records,[70] and (2) by enabling the evidence to be admitted without testimony by a bank employee.[71] These procedural "short-cuts" did not erode the reliability of the evidence because they were based on "well-accepted evidentiary practices."[72]

One such well-accepted evidentiary practice is that, as an exception to the best evidence rule,[73] summaries of business records may be admitted into evidence.[74] While section 142(c) goes beyond the established use of summary evidence by not requiring a bank employee to testify and lay a foundation, the court did not believe this departure was critical.[75] Rather, it drew another analogy—this time between the evidence admitted under section 142(c) and that admitted under the

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66. *Id.* at 459, 628 A.2d at 682. Maryland's business records exception states that "[a] writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event." MD. CODE ANN., CTS. & JUD. PROC. § 10-101(b) (1989).

67. *See* Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980).

68. The business records exception is based on the assumption that the desire of businesses to produce accurate records will minimize insincerity, *Chapman*, 331 Md. at 459, 628 A.2d at 681 (citing MCLAIN, *supra* note 28, § 803(6).1, at 380), and that the regular and continuous nature of maintaining business records will result in precision on the part of record keepers. *Chapman*, 331 Md. at 459, 628 A.2d at 681-82 (citing 2 STRONG, *supra* note 27, § 286, at 265).

69. *See Chapman*, 331 Md. at 459, 628 A.2d at 682.

70. *See id.* at 460-61, 628 A.2d at 682. While the court referred to the information contained in a § 142(c) affidavit as a "summary" of data in the bank records, *see id.* at 461, 628 A.2d at 682, it might more appropriately be considered a "compilation" of that data.

71. *Id.* at 460-61, 628 A.2d at 682.

72. *Id.* at 461, 628 A.2d at 683.

73. The best evidence rule forbids extrinsic evidence to prove the contents of admissible documentary evidence. *Id.* "Rather, the documents or records themselves must be introduced into evidence." *Id.*

74. *Id.* The court maintained that summaries either may detail information that is in the records or may report information that is not in the records. *Id.* As authority for the latter circumstance the court cited Summons v. State, 156 Md. 382, 387, 144 A. 497, 500 (1929) (holding that the testimony of a corporation director as to the absence of a record was proper without production of the official records). *Chapman*, 331 Md. at 461-62, 628 A.2d at 683. Summaries may be admitted in lieu of written evidence that is "so voluminous as to make impractical its proof on an item by item basis." MCLAIN, *supra* note 28, § 1006.1, at 545.

75. *Chapman*, 331 Md. at 462-63, 628 A.2d at 683.

public records exception[76]—to justify the absence of the out-of-court declarant.[77] The court found that "[t]he banking industry possesses qualities that assure the same degree of accuracy as public records"[78] and that the General Assembly therefore was justified in treating banks as "public or quasi-public agencies" to allow their affidavits to be "readily admissible" without testimony by a bank official.[79]

The court also rejected Chapman's argument that the affidavit lacked reliability because it was produced in anticipation of litigation.[80] Judge Chasanow wrote that the bank had "[n]either a position to advocate nor a stake in the outcome" of the trial and that the "affidavit does not reflect a pre-conceived bias."[81] Moreover, the court concluded that, despite the holding in *Idaho v. Wright*,[82] the use of the canceled check as corroborative evidence to help demonstrate "guarantees of trustworthiness" was appropriate in this case.[83]

Chapman also maintained that the incorrect year on the face of the affidavit raised doubts about the reliability of the affidavit and ren-

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76. *Id.* at 463, 628 A.2d at 683-84. The public records exception provides that a court may admit into evidence a public record without the testimony of either the preparer or custodian of the record so long as the record is "certified as a true copy by the custodian of the record." MD. CODE ANN., CTS. & JUD. PROC. § 10-204 (1989); *see also* MCLAIN, *supra* note 28, § 803.(8).1, at 394 ("[T]he statute . . . provides . . . that certified copies of . . . public records are self-authenticating . . . .").

In Ellsworth v. Sherne Lingerie, 303 Md. 581, 612, 495 A.2d 348, 363-64 (1985), the Court of Appeals adopted the rationale of Federal Rule of Evidence 803(8), which allows for admission of public records "unless the sources of information or other circumstances indicate lack of trustworthiness." FED. R. EVID. 803(8). The court reasoned that public records are presumptively admissible because public agencies are reliable and have no motive other than to objectively inform the public. *Ellsworth*, 303 Md. at 607, 495 A.2d at 361 (citing Kehm v. Proctor & Gamble, 724 F.2d 613, 618-19 (8th Cir. 1983)).

77. *Chapman*, 331 Md. at 463-64, 628 A.2d at 684.

78. *Id.* at 464, 628 A.2d at 684. The court explained that, like public agencies, banks have "strong incentives to generate and maintain accurate account records" and no "apparent motive . . . to fabricate." *Id.*

79. *Id.* at 463-64, 628 A.2d at 684.

80. *Id.* at 464, 628 A.2d at 684.

81. *Id.* at 464-65, 628 A.2d at 684-85.

82. 497 U.S. 805 (1990). For a discussion of the holding, see *supra* notes 56-58 and accompanying text.

83. *Chapman*, 331 Md. at 467, 628 A.2d at 686. The court reasoned that because § 142(c) is only employed after a check has been dishonored, "the dishonored check is . . . a prerequisite to, and a component part of, the hearsay exception." *Id.* Rather than *other* evidence, the canceled check is a "[p]art of the circumstances surrounding the genesis of the affidavit, and therefore . . . permissible corroboration under *Wright*." *Id.*

dered it inadmissible.[84] The court rejected this contention[85] by deeming the incorrect year a simple typographical error.[86]

b. Necessity Requirement.—Chapman argued that section 142(c) is per se unconstitutional because it does not require a showing of unavailability of the affiant.[87] The Court of Appeals rejected this argument, finding that under *Inadi*[88] and *White*,[89] the necessity requirement could be satisfied without showing that a declarant is unavailable.[90] The court dismissed the need for establishing the unavailability of those who generate[91] the documents in the records.[92] Because of the "routine nature" of such tasks, the court asserted, the declarant is unlikely to remember the events, and cross-examination thus would result in evidence less accurate than the affidavit itself.[93] Regarding the employees who prepared the affidavit, the court again drew an analogy between banks and public agencies.[94] The court determined that in light of the "limited utility" of cross-examining bank employees[95] and the substantial burden it would place on banks,[96]

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84. *Id.* at 473, 628 A.2d at 689. The argument was based on Moon v. State, 300 Md. 354, 370, 478 A.2d 695, 703 (1984), *cert. denied*, 469 U.S. 1207 (1985) (holding that when a discrepancy on the face of a report "gives rise to a question as to the reliability of the record and the [preparer of the record] is available . . . [,] [i]t is error not to require the declarant to testify before the record is admitted").

85. *Chapman*, 331 Md. at 473, 628 A.2d at 689.

86. *Id.* at 474, 628 A.2d at 689. In determining that the mistake was only clerical, the court again used the canceled check as corroborating evidence. *See id.*

87. *Id.* at 467, 628 A.2d at 686.

88. *See supra* notes 40-45 and accompanying text.

89. *See supra* notes 46-48 and accompanying text.

90. *Chapman*, 331 Md. at 470-71, 628 A.2d at 687-88.

91. The court's treatment of declarants who *generate* the documents in the record was separate from its treatment of those who *review* and *summarize* those documents. *See id.* at 471, 628 A.2d at 688. Under the appropriate circumstances, hearsay evidence by either of these distinct classes of out-of-court declarants is admissible. *Id.*

92. *See id.*; *see also* State v. Garlick, 313 Md. 209, 216-17, 545 A.2d 27, 30 (1988) (admitting a hospital record under the business records exception without the testimony of the employee who made the entry into the patient's medical records); Bowers v. State, 298 Md. 115, 136-37, 468 A.2d 101, 112 (1983) (holding that the right of confrontation was not violated when an autopsy report was admitted under the business records exception without testimony from the medical examiner).

93. *Chapman*, 331 Md. at 471, 628 A.2d at 688.

94. *Id.* at 471-72, 628 A.2d at 688.

95. *Id.* at 472, 628 A.2d at 689. The court reasoned that bank employees, like public officials, have no motive to fabricate and are unlikely to remember details apart from what is in the record. *Id.*, 628 A.2d at 688-89.

96. *Id.* at 473, 628 A.2d at 689. The court maintained that § 142(c) was intended to keep banks from having to carry their business records to court. *Id.* at 472, 628 A.2d at 689.

failing to require such testimony did not violate Chapman's right of confrontation.[97]

4. Analysis.—Although the Court of Appeals has consistently posited that "[i]t is an almost undeviating rule of the courts, both State and Federal, that a constitutional question will not be decided except when the necessity for such decision arises,"[98] the *Chapman* court apparently regarded the constitutionality of section 142(c) as an issue requiring immediate settlement. The court's urgency to address the issue was evident in two respects. First, it took the *Chapman* case out of order, granting certiorari on its own motion before the Court of Special Appeals could consider the case.[99] Additionally, the court did not consider the harmless error argument that the State had persuasively presented. The State maintained that because the check Chapman delivered to Sears bore several stamps indicating that his bank account was closed, the admission of the check into evidence rendered "[h]armless any error caused by admission of the affidavit."[100] This assertion was meritorious because the stamped check alone, properly admitted, provided sufficient evidence to establish Chapman's guilt. A determination of section 142(c)'s constitutionality was therefore unnecessary. By accepting the State's harmless error argument, the court could have disposed of the case without rendering a constitutional decision.

Instead, the court broadened the concept of accepted evidentiary practices with respect to each prong of the *Roberts* test. These revisions, while essential to the court's affirmation of section 142(c)'s constitutionality, materially diminished the rights of accuseds under the Confrontation Clause.

a. "Indicia of Reliability" Requirement.—Evidence admitted under section 142(c) contains two levels of hearsay—the business record from which the affidavit was created and the affidavit itself. The court correctly maintained that because section 142(c) does not fit into a firmly rooted hearsay exception, evidence submitted under it is

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97. *Id.* at 473, 628 A.2d at 689.

98. Jeffers v. State, 203 Md. 227, 230, 100 A.2d 10, 11 (1953). The Supreme Court has also discussed this aspect of judicial restraint, stating that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." Spector Motor Servs., Inc. v. Mclaughlin, 323 U.S. 101, 105 (1944).

99. *Chapman,* 331 Md. at 453, 628 A.2d at 678.

100. Brief of Appellee at 19. In Idaho v. Wright, 497 U.S. 805 (1990), the Supreme Court indicated that the existence of corroborating evidence suggests that any erroneously admitted hearsay may result only in harmless error. *Id.* at 823.

presumptively unreliable, and inadmissible unless "particularized guarantees of trustworthiness" are found.[101] In its search for such particularized guarantees, however, the court premised section 142(c)'s reliability on the reliability of the underlying bank records, even though the reliability of the underlying records was not at issue.[102] In so doing, the court ignored the questionable trustworthiness of the affidavit itself.[103] The court's failure to adequately address the *affidavit's* trustworthiness rendered its reliability analysis unsound.

The court defended the use of an affidavit under section 142(c) by comparing the affidavit to summaries of business records, which are normally admissible.[104] This analogy does not comport with logical reasoning, however, as a section 142(c) affidavit is distinguishable from business records in ways that directly impact its reliability. While summaries of business records are generally admissible[105] and some business records have been admitted without testimony,[106] before *Chapman,* no court had held that summaries of business records could be admitted without testimony.[107] The *Chapman* holding therefore creates a loophole through which unreliable evidence may be admitted.

Business records are reliable, in part, because they are produced contemporaneously with the event in question and in the regular course of business.[108] Conversely, affidavits produced pursuant to sec-

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101. *Chapman,* 331 Md. at 457-58, 628 A.2d at 681.

102. Because the underlying bank records were business records, their reliability could be "inferred without more." Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980).

103. The prevention of trial by ex parte affidavit has been the "primary object" of Confrontation Clause jurisprudence for almost one hundred years. *See* Mattox v. United States, 156 U.S. 337, 339 (1895); *see also supra* notes 26-27 and accompanying text.

104. *See Chapman,* 331 Md. at 461-62, 628 A.2d at 683.

105. *See* O'Donnell v. State, 188 Md. 693, 698, 53 A.2d 688, 689 (1947).

106. *See* Pine St. Trading Corp. v. Farrell Lines, Inc., 278 Md. 363, 373, 364 A.2d 1103, 1110 (1976) (holding that laying a foundation, which is a necessary prerequisite to the admission of business records, need not always consist of testimonial evidence). *But see* Testerman v. State, 61 Md. App. 257, 269-70, 486 A.2d 233, 238-39 (1985) (holding that a witness is needed to authenticate a business record though not required to authenticate a public record). The court cited several cases where, pursuant to 18 U.S.C. § 3505, foreign business records were admitted without testimony. *Chapman,* 331 Md. at 460, 628 A.2d at 682; *see* United States v. Sturnan, 951 F.2d 1466, 1489-90 (6th Cir. 1991), *cert. denied,* 112 S. Ct. 2964 (1992).

107. In cases cited by the court where the need for foundation testimony was waived, the actual business records were admitted. *See Pine St. Trading Corp.,* 278 Md. at 373, 364 A.2d at 1110. In *O'Donnell,* a summary was accepted in lieu of the actual business records in part because the witness was present to testify. *See O'Donnell,* 188 Md. at 696, 53 A.2d at 689-90.

108. MCLAIN, *supra* note 28, § 803(6).1, at 381. The contemporaneous requirement "reinforces the business need for accurate writings of the type in question . . . enhancing the business' interest in sincerity." *Id.* The "regular course of business [requirement] ensures the business need for it and thus provides the circumstantial guarantee of sincerity." *Id.*

tion 142(c) are produced neither contemporaneously with the event[109] nor in the regular course of business.[110] Thus, there are fewer circumstantial guarantees of trustworthiness associated with affidavits than with business records.

In addition, the reliability of section 142(c) affidavits is undermined by the lack of procedural safeguards that accompany their admission. Because no witness is required to testify as to the document's validity, the defense is afforded no opportunity to show, for example, that the bank misidentified the defendant or that the bank's search of its records in compiling the affidavit was not thorough. The procedural safeguards generally afforded defendants in connection with the acceptance of hearsay evidence, such as the presence at trial of the actual documents at issue or a witness through whom a foundation for the evidence can be laid, are lost when evidence is admitted pursuant to section 142(c).[111] Without these safeguards, the likelihood that an error exists in the affidavit increases, and the affidavit's reliability correspondingly diminishes.

The court's analogy between section 142(c) and the public records exception is even more transparent. The public records case cited by the court in drawing this comparison concerned the admission of an actual public record, which carries a presumption of reliability, rather than an affidavit, which carries no such presumption.[112] Moreover, public records are admitted without testimony because they represent *government* work. The rule stems from the reluctance of courts to burden the government by requiring that it produce a witness every time one of its records is used as evidence,[113] as well as the presumption of inherent reliability associated with public

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109. The affidavit in question was produced on November 9, 1989, more than 19 months after April 19, 1988, the date of the incident. *Chapman*, 331 Md. at 452, 628 A.2d at 678.

110. The affidavit in *Chapman* was produced in preparation for litigation and without any independent business purpose. *See* Brief of Appellant at 8.

111. The court noted that Chapman could have subpoenaed the bank records if he believed they would assist his defense. *Chapman*, 331 Md. at 473, 628 A.2d at 689. The ability of a defendant to subpoena evidence or summon a witness, however, should not relieve states of their obligations under the Confrontation Clause.

112. *See Chapman*, 331 Md. at 463, 628 A.2d at 684 (citing Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 600, 495 A.2d 348, 357 (1985) (deciding the admissibility of five government reports).

113. *See* 2 STRONG, *supra* note 27, § 295, at 289 ("[R]equiring public officials to appear in court . . . would disrupt the administration of public affairs . . . [and] almost certainly would create a class of official witnesses."); MCLAIN, *supra* note 28, § 803(8).1, at 396 (stating that it is an interference with the government's work to "unnecessarily require public employees to testify in court").

records.[114] The considerations that account for the presumption of the validity of public records therefore are not transferable to bank records, let alone affidavits of bank records.

Furthermore, Chapman's contention that the reliability of the affidavit was negatively impacted because it was prepared in anticipation of litigation merits some consideration.[115] While Chapman's bank did not have a financial stake in the outcome of his criminal trial, banks have a general interest, based on their desire to deter potential bad-check writers in the future, in seeing that parties such as Chapman are prosecuted.[116] Thus, a bank's neutrality in a case such as *Chapman* is at least questionable.

Finally, the court's reasoning is flawed because it lacks a limiting principle. The court held not only that hearsay evidence could come in under a hearsay exception not firmly rooted in the law of evidence, but that a summary of that evidence in the form of an affidavit could be admitted without a witness's accompanying testimony. Thus, under the court's reliability analysis, the legislature could pass a statute allowing for the admission, without testimonial support, of virtually any form of hearsay evidence. Such a broad legislative mandate would undoubtedly be unconstitutional.[117] Moreover, bank records do not differ from other evidence admitted pursuant to the business records exception. By holding that, consistent with the Confrontation Clause, the prosecution can prove the contents of bank records solely through an affidavit, the court has indicated that, under the same principles, the contents of the business records of any sole proprietor are also provable merely by affidavit.

b. Necessity Requirement.—In *Inadi* and *White*, the Supreme Court limited the expansive language in *Roberts* regarding unavailability.[118] In each case, however, the Court also expounded on the "independent evidentiary significance" of the applicable hearsay

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114. *Chapman*, 331 Md. at 463, 628 A.2d at 684; MCLAIN, *supra* note 28, § 803(8).1, at 395.

115. *See* Brief of Appellant at 8.

116. Banks would save substantial amounts of time and money if citizens ceased from uttering bad checks. To the degree that criminal prosecutions accomplish this end through deterrence, banks have an interest in such cases.

117. For example, this analysis would allow the court to uphold a statute providing for the admission, without testimony, of an ex parte affidavit by a witness who claims to have heard a dying declaration. Even though the hearsay exception for dying declarations is firmly rooted in the law of evidence, the admission of such an affidavit, without affording a defendant the chance to cross-examine the witness who purportedly heard the dying statement, would violate the defendant's confrontation rights.

118. *See generally supra* notes 40-48 and accompanying text.

exceptions.[119] A reasonable interpretation of those cases indicates that hearsay evidence that is necessary in a case can be admitted without testimony, while unnecessary hearsay can only come in through a live witness. Under this interpretation, necessary hearsay has independent evidentiary significance; unnecessary hearsay is merely a substitute for live testimony. In *Chapman*, the affidavit proved that Chapman did not have an account with Fairfax Savings on the day he wrote the check.[120] Because a live witness also could have proved this fact, the affidavit did not have independent evidentiary significance. Thus, the court should have held that since the affidavit did not qualify as necessary hearsay evidence, a bank employee was required to testify at trial.

Additionally, the court's assertion that it would be disruptive and burdensome to force banks to produce witnesses in such cases is untenable. Even if the court had adequately supported its contention that requiring banks to provide witnesses at criminal trials for uttering bad checks would impose a "substantial burden" on banks,[121] such an inconvenience should be overlooked when the alternative may result in the violation of a constitutional right.

5. Conclusion.—In *Chapman*, the Court of Appeals upheld the constitutionality of a statutory hearsay exception, thus narrowing the scope of a defendant's right to confrontation. While the decision was not surprising given the recent legal trends toward limiting rights of the accused in the area of criminal procedure, the strained reasoning employed by the court to reach the decision was unjustified and unnecessary. Similar casual treatment of confrontation rights has led some scholars to conclude that the Confrontation Clause is nothing more than a codification of the hearsay rules.[122]

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119. *See supra* notes 44, 48 and accompanying text.

120. *See Chapman*, 331 Md. at 452, 628 A.2d at 678.

121. *Id.* at 473, 628 A.2d at 689.

122. *See generally* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558 (1988) ("The confrontation clause is no longer a constitutional right protecting the accused, but essentially a minor adjunct to evidence law."); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 557 (1992) (maintaining that the Supreme Court has transformed the Confrontation Clause into an evidentiary doctrine).

B. *Maryland Rule 1-502: A Required Balancing Test Before Impeachment by Prior Criminal Conviction*

In *Beales v. State*,[1] the Court of Appeals held that newly adopted rule 1-502[2] requires that, in determining whether to admit evidence of a witness's prior conviction offered for impeachment purposes, a trial judge must balance the probative value of the evidence against its potential for unfair prejudice to the witness or objecting party.[3] Under prior law, evidence of a witness's conviction for an infamous crime was per se admissible for impeachment purposes.[4] Moreover, the *Beales* court ruled that a trial judge's failure to perform the requisite balancing test cannot constitute harmless error unless it can be shown beyond a reasonable doubt that the untested impeachment evidence did not influence the jury.[5]

The decision in *Beales* confirmed that rule 1-502 significantly changed trial practice in Maryland's state courts. While the new Rule did not change the class of admissible crimes, it mandated that the balancing test be applied to "*all* convictions used to impeach credibility."[6] The *Beales* decision also indicated that, despite the Rule's fifteen-year limit on admissibility,[7] courts should still consider the

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1. 329 Md. 263, 619 A.2d 105 (1993).

2. MD. R. 1-502 (1991). The Rule states in pertinent part:

> (a) *Generally.*—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime was an infamous crime or other crime relevant to the witness's credibility and the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) *Time Limit.*—Evidence of a conviction under this Rule is not admissible if a period of more than 15 years has elapsed since the date of the conviction.

Id. Rule 1-502 went into effect eight days before the *Beales* trial began. *Beales*, 329 Md. at 267 n.1, 619 A.2d at 107 n.1.

3. *Beales*, 329 Md. at 273, 619 A.2d at 110.

4. MD. CODE ANN., CTS. & JUD. PROC. § 10-905 (1989). Section 10-905 read:

> (a) *In general.*—Evidence is admissible to prove the interest of a witness in any proceeding, or the fact of his conviction of an infamous crime. Evidence of conviction is not admissible if an appeal is pending, or the time for an appeal has not expired, or the conviction has been reversed, and there has been no retrial or reconviction.
>
> (b) *Certificate under seal as evidence.*—The certificate, under the seal of the clerk of the court, of the court in which the conviction occurred is sufficient evidence of the conviction.

Id.

5. *Beales*, 329 Md. at 274-75, 619 A.2d at 111.

6. *Id.* at 270, 619 A.2d at 109.

7. MD. R. 1-502(b); *see supra* note 2.

remoteness of a conviction when performing the balancing test.[8] The court did not, however, suggest other factors courts should consider in conducting the requisite balancing or explain how judges should indicate to an appellate court that the balancing was done. Thus, the *Beales* decision left trial judges free to apply their own standards and failed to ensure a measure of uniformity in application of the balancing test.

1. The Case.—William Lee Beales was tried before a jury in the Circuit Court for Baltimore City on charges of battery and carrying a deadly weapon with intent to injure.[9] The charges stemmed from an altercation in which Beales allegedly stabbed Sandra Herbert.[10] Evidence proved that Herbert sustained a puncture wound to her shoulder,[11] but she and Beales presented markedly different versions of the surrounding incident.[12] At trial, Beales called as witnesses Joseph Lambert, who was with him during the alleged attack, and his girlfriend, Tina McGee, who testified that she witnessed the altercation from her second story window.[13] Both witnesses corroborated Beales's claim that he did not stab Herbert and was not carrying a knife at the time of the incident.[14]

During cross examination, the prosecutor asked Lambert whether he had ever been convicted of a crime of dishonesty.[15] Defense counsel objected on the basis of rule 1-502, arguing that impeachment evidence was no longer per se admissible and that, under the new Rule, the court must balance the probative value of the evidence against its potential for unfair prejudice before ruling on its admissibility.[16] The prosecutor dismissed defense counsel's interpretation as "hogwash" and asserted that bias is always admissible.[17] The judge recharacterized the issue as one of credibility.[18] He found that rule 1-502 retained the per se admissibility of prior convictions of infamous crimes embodied in section 10-905 of the Courts and Judicial Proceedings Article[19] and granted the prosecutor the right to put the

8. *Beales*, 329 Md. at 274, 619 A.2d at 110.
9. *Id.* at 267, 619 A.2d at 107.
10. *Id.*
11. *Id.*
12. *Id.* at 274-75, 619 A.2d at 111.
13. *Id.* at 267, 619 A.2d at 107.
14. *Id.*
15. *Id.* at 268, 619 A.2d at 107.
16. *Id.*
17. *Id.*, 619 A.2d at 107-08.
18. *Id.*, 619 A.2d at 108.
19. MD. CODE ANN., CTS. & JUD. PROC. § 10-905 (1989); *see supra* note 4.

information before the jury.[20] The prosecutor elicited that Lambert had been convicted of theft fourteen years earlier.[21]

Beales was convicted of battery and sentenced to three years in prison.[22] He appealed the conviction to the Court of Special Appeals, asserting that the trial court erred by not applying the balancing test required under rule 1-502 before admitting Lambert's theft conviction into evidence.[23] The Court of Appeals granted certiorari prior to a determination by the intermediate appellate court,[24] reversed Beales's conviction, and ordered a new trial.[25]

2. Legal Background.—

a. Common Law Impeachment for Prior Conviction.—At common law, a person convicted of treason, a felony, or *crimen falsi*[26] was barred from appearing as a witness at trial.[27] Disqualification arose from the view that anyone convicted of such a crime was of bad character and likely to lie in court.[28] Eventually, however, every jurisdiction abandoned absolute disqualification based on prior convictions.[29] Instead, to protect against potential of untruthful testimony, witnesses with prior criminal convictions were permitted to testify subject to impeachment by the opposing party.[30] In Maryland, the General Assembly ended common-law disqualification when it enacted chapter 109 of the Acts of 1864.[31] Later, chapter 109 was incorporated into section 10-905 of the Courts and Judicial Proceedings

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20. *Beales*, 329 Md. at 268, 619 A.2d at 108.

21. *Id.* at 268-69, 619 A.2d at 108.

22. *Id.* at 269, 619 A.2d at 108.

23. *Id.*

24. *Id.*

25. *Id.* at 275, 619 A.2d at 111.

26. *Crimen falsi* "include crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense involving some element of deceitfulness, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully." Wicks v. State, 311 Md. 376, 382, 535 A.2d 439, 461-62 (1988) (citing BLACK'S LAW DICTIONARY 335 (5th ed. 1979)).

27. THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 124, 126-29 (1806); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 609(02), at 609-28 (1993).

28. Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884); *see also* WEINSTEIN & BERGER, *supra* note 27, ¶ 609(02), at 609-29.

29. WEINSTEIN & BERGER, *supra* note 27, ¶ 609(02), at 609-28.

30. *Id.*

31. Act of Mar. 2, 1864, ch. 109, 1864 Md. Laws 136-37; *see also* Prout v. State, 311 Md. 348, 358-59, 535 A.2d 445, 450 (1988).

Article,[32] which governed impeachment law until rule 1-502 took effect on January 1, 1992.[33]

Section 10-905(a) provided that "evidence is admissible to prove the interest of a witness . . . or the fact of his conviction of an infamous crime."[34] The Court of Appeals interpreted the meaning of the phrases "is admissible" and "infamous crime" in a trilogy of 1988 cases: *Prout v. State*,[35] *Watson v. State*,[36] and *Wicks v. State*.[37] The court based its decisions on the legislative history of section 10-905, which indicated an intent to abolish the rule of absolute incompetence.[38]

In *Prout*, the court held that by enacting chapter 109, the General Assembly transformed the common-law bar to testifying into an issue of witness credibility.[39] Consequently, when a witness had been convicted of a crime that under common law would have barred the witness from testifying, the court held that, under section 10-905, the opposing party must have an opportunity to test that witness's credibility by introducing evidence of a prior conviction.[40] Despite the statute's permissive statement that "evidence is admissible," the court interpreted section 10-905 to mean that evidence of a conviction of an "infamous crime" is per se admissible.[41] The *Prout* court, however, designated crimes that did not disqualify a witness at common law as "lesser crimes."[42] These lesser crimes were admissible under section 10-905 for impeachment purposes, subject to judicial discretion, only if the crimes had a bearing on the credibility of the witness.[43] Accordingly, the court held that it was within the trial judge's discretion not to admit into evidence the prior convictions for prostitution and solicitation (for prostitution) of the State's sole witness, the victim.[44]

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32. MD. CODE ANN., CTS. & JUD. PROC. § 10-905 (1973); *see supra* note 4; *see also Prout*, 311 Md. at 358-59, 535 A.2d at 450.

33. 18 Md. Reg. 2622 (1991).

34. MD. CODE ANN., CTS. & JUD. PROC. § 10-905(a) (1973).

35. 311 Md. 348, 535 A.2d 445 (1988).

36. 311 Md. 370, 535 A.2d 455 (1988).

37. 311 Md. 376, 535 A.2d 459 (1988).

38. *Prout*, 311 Md. at 363, 535 A.2d at 452; *Watson*, 311 Md. at 374, 535 A.2d at 457; *Wicks*, 311 Md. at 380-81, 535 A.2d at 460-61.

39. *Prout*, 311 Md. at 359-60, 535 A.2d at 450-51.

40. *Id.* at 359, 535 A.2d at 450.

41. *Id.* at 359-60, 535 A.2d at 450-51.

42. *Id.* at 363-65, 535 A.2d at 452-53.

43. *Id.* at 363, 535 A.2d at 452.

44. *Id.* at 351, 352-53, 535 A.2d at 446, 447. Historically, prostitution was an ecclesiastical crime and not within the jurisdiction of the common-law courts. *Id.* at 364 n.8, 535 A.2d at 453 n.8. Thus, because prostitution was not a common-law offense, the court found that prostitution and solicitation were lesser crimes, subject to judicial balancing. *Id.* at 365 n.8, 535 A.2d at 453 n.8.

In *Watson*, the court used its *Prout* definition of lesser crimes to rule that attempted rape was a lesser crime because it did not constitute a common-law infamous crime.[45] At common law, all attempted crimes were misdemeanors.[46] Furthermore, attempted rape was not considered a *crimen falsi* because it does not involve fraud, dishonesty, or treason.[47] Consequently, the court determined that the trial judge erred in allowing the defendant to be impeached on the stand on the basis of his attempted rape conviction, when the judge found that the probative value of the conviction outweighed its unfair prejudicial effect.[48]

Finally, in *Wicks*, the court allowed admission of a thirty-five-year-old conviction for petit larceny, holding that petit larceny was an infamous crime within the meaning of section 10-905 because it was a common-law felony in 1864.[49] The court found it immaterial that the General Assembly had made petit larceny a misdemeanor in 1933, well before the witness was charged,[50] and concluded that even if petit larceny were not a common-law felony, it constituted a *crimen falsi* because "theft, in any amount, is the embodiment of deceitfulness."[51] In so ruling, the court indicated that the decisive factor in determining whether a crime was an infamous crime, and thus per se admissible for impeachment purposes, was its status in 1864 when chapter 109 was enacted.[52]

Thus, under section 10-905, a judge potentially had to apply three tests. First the judge had to determine whether a crime was an infamous crime, and as such per se admissible, or a lesser crime.[53] If it was a lesser crime, the judge had to decide whether it had a bearing on the credibility of the witness.[54] Finally, if the crime was deemed relevant to the witness's credibility, the judge had to weigh the probative value of the prior conviction against its unfair prejudicial effect.[55] Deferring to the discretion of trial judges, the court did not establish rigid guidelines for the balancing test, but instead suggested several factors to be considered.[56] Acts of violence and convictions remote in

45. Watson v. State, 311 Md. 370, 375, 535 A.2d 455, 458 (1988).
46. *Id.* (citations omitted).
47. *Id.*
48. *Id.* at 373, 535 A.2d at 457. Watson was on trial for first degree rape. *Id.*
49. Wicks v. State, 311 Md. 376, 382-84, 535 A.2d 459, 462-63 (1988).
50. *Id.* at 381-82, 535 A.2d at 461.
51. *Id.* at 382, 535 A.2d at 462.
52. *Id.* at 380-82, 535 A.2d at 460-61.
53. *See* Prout v. State, 311 Md. 348, 363, 535 A.2d 445, 452 (1988).
54. *Id.*
55. *Id.*
56. *Id.* at 364, 535 A.2d at 452-53. These suggestions included the following:

time, however, were deemed to have little, if any, bearing on honesty and veracity.[57]

While the court continued to adamantly adhere to prior law regarding section 10-905, it seemed, in *Wicks*, to invite a rule change.[58] The court noted the inflexibility of section 10-905, but stated that a rule change must come either from legislative action or the court's rule-making powers,[59] the latter being the preferred route.[60]

b. The Rule-Making Process.—Soon after the *Wicks* decision, the Court of Appeals Standing Committee on Rules of Practice and Procedure[61] began formulating a new rule, using Federal Rule of Evidence 609[62] as a model.[63] Committee minutes indicate that while

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> First, acts of deceit, fraud, cheating or stealing are generally regarded as reflecting adversely on one's likelihood to be truthful, while acts of violence generally have little, if any, bearing on honesty and veracity. Second, a conviction for dishonesty, if followed by a long period of exemplary living may be too remote to have significant probative value on the truth-telling process. Another important factor to remember is that a prior conviction which is similar to the crime for which the defendant is on trial may have a tendency to suggest to the jury that if the defendant did it before he probably did it this time. The above factors are by no means exhaustive and are only offered as examples of the kind of matters which the trial judge may consider in determining the consequences of admitting this kind of impeachment evidence.

Id.

57. *Id.*

58. *Wicks*, 311 Md. at 383-84 & n.5, 619 A.2d at 462 & n.5.

59. *Id.* at 384, 535 A.2d at 462.

60. *Id.* at 384 n.5, 535 A.2d at 462 n.5. The court stated, "the area of law addressed in this opinion would appear to be an appropriate one for consideration by the Rules Committee." *Id.* at 384 n.5, 619 A.2d at 462 n.5.

61. The Rules Committee's membership includes judges, members of the General Assembly, and practitioners. *See* Minutes of the Court of Appeals Standing Committee on Rules of Practice and Procedure [hereinafter Minutes], Sept. 7-8, 1990, at 1.

62. Rule 609 reads in pertinent part:

> (a) General Rule. For the purpose of attacking the credibility of a witness,
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> (1) evidence that the witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the

there was considerable disagreement and negotiation over what crimes should be admissible for impeachment purposes and over the appropriate time limit for their admission, there was early and consistent consensus on the inclusion of the balancing test.[64] The Committee published proposals for a new rule twice and each time provided a balancing test.[65] In its deliberations, the Committee made clear its view of the effect the new rule would have on existing statutes, specifically sections 9-104[66] and 10-905.[67] The Committee worked under the assumption that when section 10-905 and the new impeachment rule conflicted, the new rule would take precedence.[68] But with regard to section 9-104, the perjury statute, the Committee believed that if the new rule made no mention of section 9-104, the statute would prevail, retaining the absolute incompetency of a witness convicted of perjury.[69]

Finally, the Court of Appeals considered the proposed rule 1-502 at a public hearing on October 24, 1991.[70] At the hearing, Judges Murphy, McAuliffe, Karwacki, Chasanow, and Bell agreed that the new rule would "preserve the existing law concerning what crimes are available for impeachment, but add a weighing and balancing in every instance . . . ."[71] The rule-making process concluded when the Court of Appeals published its final version of rule 1-502 in the *Maryland*

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proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

FED. R. EVID. 609.

63. Minutes, Apr. 22-23, 1988, at 33. The Committee approved a new rule of impeachment and sent it to the Court of Appeals. *Id.* Ultimately, the court tabled action on the measure because of impending changes in Federal Rule of Evidence 609, on which the Maryland Rule was based. Minutes, Sept. 7-8, 1990, at 13. The Rules Committee resumed work on a new Maryland Rule in 1990 after the expected amendment of federal Rule 609. *Id.* Because the Court of Appeals considered enacting a new rule so important, it requested that the committee not wait for the entire codification of the Maryland rules to reconsider impeachment by prior conviction. *Id.*

64. Minutes, Sept. 7-8, 1990, at 14-36, and May 17-18, 1991, at 6-15.

65. *See* 17 Md. Reg. 2722-23 (1990); 18 Md. Reg. 1907 (1991).

66. MD. CODE ANN., CTS. & JUD. PROC. § 9-104 (1973). "A person convicted of perjury may not testify." *Id.*

67. Minutes, Sept. 7-8, 1990, at 18.

68. *Id.*

69. *Id.* at 29.

70. *Beales*, 329 Md. at 272, 619 A.2d at 109.

71. *Id.* (citing transcript of Oct. 24, 1991 meeting).

Register,[72] making the rule effective and applicable to all actions beginning on or after January 1, 1992.[73]

3. The Court's Reasoning.—The *Beales* court regarded the central issue on appeal as whether evidence of a defense witness's[74] prior theft conviction is per se admissible or subject to a required balancing of its probative value and potential for unfair prejudice under rule 1-502.[75] Although it was interpreting a self-authored rule, the court relied on prior case law, traditional rules of statutory construction, and the history of rule 1-502 to reach its conclusion that the Rule "requires a preliminary determination of probativeness and potentially unfair prejudice for *all* convictions used to impeach credibility."[76]

As a preliminary matter, the court grafted onto rule 1-502 its section 10-905 meaning of the term "infamous crime," as interpreted in *Prout, Watson,* and *Wicks.*[77] Thus, under rule 1-502, infamous crimes include common-law felonies and *crimen falsi.*[78] In the court's view, theft, the crime for which Beales's witness was convicted, constitutes a *crimen falsi* because "it is the embodiment of deceitfulness."[79]

Turning to the applicability of the balancing test, the court noted that principles of statutory construction apply to interpretation of court rules.[80] Although it purported to apply the plain meaning rule—that courts should look first to the "ordinary and natural im-

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72. 18 Md. Reg. 2622 (1991).

73. *Id.* Rule 1-502 was rewritten as rule 5-609 in the recently enacted Maryland Rules of Evidence. The reporter's note states that the changes to rule 5-609(a) "codify the interpretation of this rule set forth in *Beales v. State*, 329 Md. 263 (1993)." 20 Md. Reg. P-15 (1993).

74. The court used the term "defense witness" when stating the issue, but at all other times referred simply to "witnesses." It is unclear whether the court used the term "defense witness" inadvertently or was preserving a separate issue. *See Beales*, 329 Md. at 267, 619 A.2d at 107.

75. *Id.*

76. *Id.* at 270, 619 A.2d at 109.

77. *Id.* at 269-70, 619 A.2d at 108. The court noted that during the October 24, 1991 public hearing, Judge McAuliffe made a motion "the effect of which should be to preserve the existing law concerning what crimes are available for impeachment, except to add to it a weighing and balancing in every instance." *Id.* at 272 n.2, 619 A.2d at 109 n.2.

78. *Id.* at 270, 619 A.2d at 108. *Crimen falsi* continue to include offenses such as "crimes in the nature of perjury, false statements, criminal fraud, embezzlement, false pretense, or any other offense involving some element of deceitfulness, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully." *Id.* at 269-70, 619 A.2d at 108.

79. *Id.*

80. *Id.* at 271, 619 A.2d at 109; *see* State v. Romulus, 315 Md. 526, 533, 555 A.2d 494, 497 (1989) (reasoning that principles of construction apply equally to the court's rules); *accord In re* Leslie M., 305 Md. 477, 481, 505 A.2d 504, 507 (1986).

port" of the words in a rule[81]—the court actually focused on the grammatical construction of rule 1-502.[82] In so doing, the court found that the phrase "but only if the crime was an infamous crime or other crime relevant to the witness's credibility," operates "as a single, integral component of that rule."[83] The court determined that the most natural reading of the rule was to read it as a whole and without a pause.[84] It rejected the State's contention that the phrase containing the balancing test was a qualifying clause, not preceded by a comma, and therefore, applicable only to the phrase "other crimes relevant to the witness's credibility."[85]

To bolster its conclusion that "Rule 502(a), by design, differs from earlier Maryland law in that it abandons every vestige of per se admissibility regarding evidence of prior convictions for the purposes of impeachment,"[86] the court drew upon the rule's history. Authoritative support included the court's suggestion in *Wicks* that a new rule be created,[87] the Rules Committee's work in response to that suggestion,[88] and the Committee's minutes and published proposals, each of which included a balancing test.[89] Most significant was the transcript of the court's October 24, 1991 public hearing at which Judges McAuliffe, Karwacki, Chasanow, Bell, and Murphy voted to retain the crimes then available for impeachment under section 10-905, but to add the balancing test "in every instance."[90] The transcript also supports the court's conclusion that the *absence* of a comma before the phrase "or other crime relevant to the witness's credibility" meant that the balancing test applies equally to infamous crimes and other crimes bearing on credibility.[91] The court noted that rule 1-502 is more lenient than Federal Rule of Evidence 609 because the federal Rule still pro-

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81. *Beales*, 329 Md. at 271, 619 A.2d at 109 (citing NCR Corp. v. Comptroller, 313 Md. 118, 124, 544 A.2d 764, 767 (1987); Comptroller v. Fairchild Indus., 303 Md. 280, 284, 493 A.2d 341, 343 (1985)).

82. *See id.*

83. *Id.*

84. *Id.*

85. *Id.* at 270, 619 A.2d at 108-09; *see also* Brief for Appellee at 6. The State's interpretation was based on the rule advanced in Sullivan v. Dixon, 280 Md. 444, 373 A.2d 1245 (1977), that "a qualifying clause ordinarily is confined to the immediately preceding words or phrase—particularly in the absence of a comma." *Id.* at 451, 373 A.2d at 1249.

86. *Beales*, 329 Md. at 273, 619 A.2d at 110.

87. *Id.* at 271, 619 A.2d at 109 (citing *Wicks*, 311 Md. 376, 384 n.5, 535 A.2d 459, 462 n.5 (1988)).

88. *Id.* at 271-72, 619 A.2d at 109.

89. *Id.*

90. *Id.* at 272 n.2, 619 A.2d at 109 n.2.

91. *Id.* at 271, 619 A.2d at 109.

vides for per se admission of impeachment convictions where the crime involves dishonesty or false statement.[92]

Lastly, the court asserted that its power to create rules derives from its authority "to regulate . . . the admissibility of evidence in all cases, including criminal cases,"[93] and that under Maryland statutory and common law, a later rule supersedes an earlier statute if they conflict.[94] The court rejected the State's contention that when possible, rules and statutes should be interpreted so as not to conflict with each other.[95] Where rule 1-502 conflicts with section 10-905, the court held that rule 1-502 prevails.[96]

Applying its interpretation of rule 1-502 to Beales's case, the court viewed the trial court's actions in light of its presumption that judges properly perform their duties.[97] The court reversed Beales's conviction, however, because it did not find sufficient evidence to indicate that the trial court performed the requisite balancing test.[98] Although the court appeared not to require specific findings, it looked at the trial judge's remarks "as a whole" and found three errors.[99] First, the trial judge only considered whether the prosecutor's question was in proper form and did not consider the effect the impeachment evidence would have on the defense.[100] Second, the trial judge granted the State a per se right to impeach the witness, leaving no possibility that he exercised discretion in conjunction with the balancing test.[101] Finally, the trial judge failed to ascertain whether the conviction occurred within the past fifteen years, as required by rule 1-502.[102] Because the court viewed remoteness of the prior conviction as an essential element of rule 1-502's balancing test, this error clearly indicated to the court that the trial judge applied section 10-905 rather than rule 1-502.[103]

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92. *Id.* at 273, 619 A.2d at 110; *see* FED. R. EVID. 609(a)(2).

93. *Beales*, 329 Md. at 273, 619 A.2d at 110 (citing MD. CODE ANN., CTS. & JUD. PROC. § 1-201(a) (1989)).

94. *Id.; see also* MD. CODE ANN., CTS. & JUD. PROC. § 1-102(a) (1989); Johnson v. Swann, 314 Md. 285, 289, 550 A.2d 703, 705 (1988).

95. *See Beales*, 329 Md. at 273, 619 A.2d at 110.

96. *Id.*

97. *Id.*

98. *Id.* at 274, 619 A.2d at 110.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*, 619 A.2d at 110-11.

The court did not believe that the judge's failure to perform the balancing test was harmless error.[104] It reasoned that because Beales and his alleged victim presented completely different descriptions of the incident in question, witness credibility was crucial to the case.[105] When the defendant's chief witness was labeled a thief, his testimony was tainted and there was no way to measure its effect on the jury's verdict.[106] Because appellate courts can find errors harmless only when they are certain beyond a reasonable doubt that the error did not in any way sway the verdict, the court remanded the case for a new trial.[107]

4. Analysis.—This case is unique because the Court of Appeals interpreted a rule that the court itself wrote and promulgated after holding a public hearing. Traditional rules of statutory construction and the court's clear intent to make rule 1-502's balancing test apply to all crimes support the court's interpretation. Still, the court's opinion is deficient in three ways. First, its purported reliance on the plain meaning rule and the Rules Committee process give the impression that the underlying rationalization for the court's interpretation was that it knew what the Rule meant because the court wrote it. Second, the court's comparison of rule 1-502 to Federal Rule of Evidence 609 was flawed. Third, and most importantly, the court's opinion insufficiently instructed judges and practitioners on how to implement the rule.

a. Statutory Construction.—The court's purported reliance on the plain meaning rule was misplaced because the meaning of the words of rule 1-502 was not in question.[108] At issue instead was whether the Rule's grammatical construction rendered the balancing test applicable to all crimes or only to lesser crimes.[109]

In *Comptroller v. Fairchild*,[110] the court stated that a rule "[s]hould not be construed by forced or subtle interpretations designed to extend or limit the scope of its operation."[111] The *Beales* court properly rejected the strained interpretation offered by the State, which asserted that only evidence of lesser crimes should be subject to rule 1-

104. *Id.* at 274-75, 619 A.2d at 111.
105. *Id.* at 275, 619 A.2d at 111.
106. *Id.*
107. *Id.*
108. *See supra* notes 81-82 and accompanying text.
109. *Beales*, 329 Md. at 270, 619 A.2d at 108.
110. 303 Md. 280, 493 A.2d 341 (1985).
111. *Id.* at 284, 493 A.2d at 343.

502's balancing test.[112] A common sense reading of the Rule supports the court's view that the lack of a comma in the phrase "[i]nfamous crime or other crime" indicates that the balancing test applies to both types of crimes.[113] Thus, in this case, the court properly rejected the State's argument that, in the absence of a comma, a qualifying phrase is ordinarily limited to the proceeding word or phrase.[114]

Rules of statutory construction also require a reading that comports with legislative intent,[115] which in the instant case was to change the old rule.[116] The court correctly viewed as particularly significant the transcript of the public hearing where five members of the court agreed that the balancing test applied to every crime admissible for witness impeachment.[117] The relevance of the Rules Committee's drafts and meetings, the proposed rules that included a balancing test, and their publication in the *Maryland Register* is less clear. Members of the court do not sit on the Rules Committee and, except for the balancing test, the court did not adopt the Rules Committee's proposals.[118] Much of the Committee's time, moreover, was spent trying to draft a rule which would garner enough votes on the court.[119]

Nevertheless, in light of the court's express intent to apply the balancing test to all crimes admissible for impeachment purposes and the court's power to make rules,[120] the court had clear authority for its conclusion that rule 1-502 takes precedence over section 10-905.[121]

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112. *Beales*, 329 Md. at 270, 619 A.2d at 108.

113. *See* MD. R. 1-502 (1991); *see supra* note 2.

114. *See Beales*, 329 Md. at 270-71, 619 A.2d at 108-09. Although the court did not explain this determination, a comparison of Sullivan v. Dixon, 280 Md. 444, 373 A.2d 1245 (1977), on which the State relied, and *Beales* indicates that the two cases are distinguishable and the State's contention was spurious. In *Sullivan*, the court construed the phrase "a professional corporation may invest its funds in real estate, mortgages, stocks, bonds, or any other type of investment, and may own real or personal property necessary for the performance of a professional service." *Id.* at 450, 373 A.2d at 1249. The qualifying phrase not preceded by a comma was "necessary for the performance of a professional service," which the court construed to limit or qualify the kind of "real or personal property" that a corporation could own. *Id.* at 451, 373 A.2d at 1249. In contrast, the phrase "and the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice" in rule 1-502 does not identify a smaller class of lesser crimes to which the rule would be applicable. MD. R. 1-502(a); *see supra* note 2, notes 83-85 and accompanying text. Unlike the phrase in *Sullivan*, the rule 1-502 phrase is not a qualifying phrase.

115. *Sullivan*, 280 Md. at 451, 373 A.2d at 1249.

116. *See Beales*, 329 Md. at 271-72, 619 A.2d at 109.

117. *Id.* at 272 n.2, 619 A.2d at 110 n.2.

118. *See* 18 Md. Reg. 1906-07 (1991); 17 Md. Reg. 2722-23 (1990); *see also supra* notes 64-65 and accompanying text.

119. *See* Minutes, May 7-8, 1991, at 4-15.

120. MD. CODE ANN., CTS. & JUD. PROC. § 1-201(a) (1989).

121. *Id.* § 1-201(c) (stating that a rule supersedes a statute if they conflict).

Consequently, the court properly rejected the State's contention that rule 1-502 and section 10-905 should be read so as not to conflict with each other.[122]

b. Comparison with Federal Rule of Evidence 609 and the Rules of Other States.—The Court of Appeals viewed rule 1-502 as more lenient than Federal Rule of Evidence 609,[123] but this conclusion is only partially accurate. While rule 609(a)(2) allows per se admission of convictions involving dishonesty or false statement, it severely narrows the class of crimes that are admissible.[124] Most common-law felonies and *crimen falsi* are not admissible as crimes of dishonesty or false statement under the federal Rule.[125] In addition, the time limit in the federal Rule is ten years.[126] It may be extended at the discretion of the trial court, but only if stringent requirements are met.[127] These requirements include support by specific facts and circumstances that the probative value of the conviction substantially outweighs its prejudicial effect and that there was advance notice to the adverse party sufficient to provide a fair opportunity to contest such admission.[128]

Rule 609(a)(1) allows impeachment for any crime punishable by death or imprisonment for more than one year, subject to a balancing test.[129] For a defendant in a criminal case, the balancing test is identical to the rule 1-502 test.[130] Under both rules, evidence of prior convictions is presumptively inadmissible unless it passes the balancing

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122. *See Beales*, 329 Md. at 273, 619 A.2d at 110.

123. *Id.*

124. FED. R. EVID. 609. See *supra* note 62 for the text of rule 609.

125. The federal rules do not contemplate including crimes such as robbery and theft within the rule 609 meaning of dishonesty and false statement. *See* FED. R. EVID. 609 advisory committee's note to 1990 amendment. The Committee noted that

> Congress extensively debated the rule and the Report of the House and Senate Conference Committee states that "[b]y the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of 'dishonesty' admitting convictions such as for bank robbery or bank larceny."

Id.

126. FED. R. EVID. 609(b).

127. *Id.*

128. *Id.*

129. FED. R. EVID. 609(a)(1).

130. *See* MD. R. 1-502.

test.[131] As applied to nondefendant witnesses, or defendant witnesses in civil trials, however, the federal Rule is more stringent than rule 1-502 because admission is subject to Federal Rule of Evidence 403.[132] Under rule 403, evidence is presumptively admissible unless its probative value is *substantially* outweighed by unfair prejudice.[133] The ten-year time limit, with the same limited possibilities for extension, also apply to rule 609(a)(1).[134] In contrast, the Maryland Rule has an absolute time limit but the term is longer, fifteen rather than ten years, and runs from the date of conviction instead of the later of conviction or release from prison.[135]

Thus, whether rule 1-502 will operate more leniently than the federal Rule will depend on the facts of the case. If Beales's trial had been held in a federal court, it is unlikely that Beales's witness would have been impeached. In most circuits, theft is not classified as a crime involving "dishonesty or false statement" and is therefore not per se admissible under rule 609.[136] Admittedly, a federal prosecutor could try to impeach a witness convicted of theft under rule 609(a)(1), which has a more stringent balancing test for nondefendant witnesses.[137] But, even in a federal circuit that classifies theft as a crime of "dishonesty or false statement," it is unlikely that a judge would have extended the ten-year limitation to cover a lone fourteen-year-old conviction.[138]

While rule 1-502 is important, Maryland is not in the forefront of change with regard to impeachment law. A significant number of states have already adopted the federal Rule with minor changes and most states have included balancing tests with a wide range of liberality either by statute or judicial interpretation.[139] At the extreme, Ha-

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131. *Id.*

132. FED. R. EVID. 609(a)(1).

133. FED. R. EVID. 403.

134. FED. R. EVID. 609(b).

135. MD. R. 1-502.

136. *See, e.g.*, United States v. Logan, 998 F.2d 1025, 1032 (D.C. Cir. 1993) (stating that taking property without a right is not a crime of dishonesty or false statement); United States v. Media-Alarcon, 995 F.2d 982, 989-90 (10th Cir. 1993) (holding that burglary, robbery, and shoplifting are not automatically impeachable under rule 609); United States v. Brackeen, 969 F.2d 827, 830 (9th Cir. 1992) (stating that bank robbery is not a *crimen falsi*).

137. *See supra* text accompanying notes 131-133.

138. *See* FED. R. EVID. 609(b); *see supra* note 62.

139. *See, e.g.*, ARK. CODE ANN. § 16-41-101, R. 609(b) (Michie 1992) (imposing a 10-year limit on admissibility); ARIZ. R. EVID. 609 (requiring a balancing test for all admissible crimes and a 10-year limit with allowance to admit crimes more than 10 years old with judicial discretion and advance notice to the opposing party); D.C. CODE ANN. § 14-305 (1992) (imposing a 10-year limit on admissibility); NEV. REV. STAT. ANN. § 50.095 (Michie 1986) (providing an absolute 10-year limit on admissibility of prior convictions). *But see*

waii allows no impeachment of criminal defendants[140] and Montana allows no impeachment of any witness.[141]

c. Implications for Maryland.—The significance of the court's interpretation of rule 1-502 was illustrated in the *Beales* case. Who possessed the knife and what actually transpired was crucial to the case, and Lambert's testimony was important to Beales.[142] A fourteen-year-old theft conviction was likely to have had only minimal probative value for determining the credibility of Beales's witness. Indeed, if the conviction had occurred only one year earlier, it would have been barred entirely by the Rule.[143] Introduction of this impeachment evidence might well have caused the jury not to weigh the witness's credibility objectively.[144] With his primary witness impeached, Beales had to rely on the testimony of his girlfriend, Tina McGee, to rebut the victim. The jury might well have been reluctant to rely on McGee's testimony because of her remoteness from the scene and her possible bias.[145] Applied properly, rule 1-502's presumption of inadmissibility of impeachment evidence should have forced the trial judge to consider whether the probative value of the witness's testimony outweighed its potential for unfair prejudicial effect. In this context, an unfair prejudicial effect far outweighed any probative value.

Unfortunately, the Court of Appeals gave little guidance to future trial courts regarding factors they should consider in conducting the requisite balancing. While rule 1-502(b) provides an absolute time limit on admissibility, the *Beales* opinion indicated that the remoteness of the conviction should nevertheless be considered in the balancing.[146] Unstated is whether, like the definition of infamous crimes,[147] the court intended all factors identified in prior Maryland case law regarding section 10-905 to apply equally to rule 1-502. Under section 10-905, the balancing test applied only to lesser crimes and a trial court had to make a threshold determination as to whether the crime for which the witness had been convicted reflected on his propensity

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N.C. GEN. STAT. § 8C-1 R. 609 (1992) (admitting all convictions punishable by 60 days of confinement but placing a 10-year limit on admissibility with judicial discretion to admit older convictions with notice to the opposing party).

140. HAW. REV. STAT. EVID. R. 609 (making convictions of criminal defendants per se inadmissible).

141. MONT. R. EVID. 609.

142. *Beales*, 329 Md. at 274, 619 A.2d at 110.

143. *Id.*

144. *Id.* at 274, 619 A.2d at 110.

145. *See* Appellant's Brief at 6; *supra* notes 10-13 and accompanying text.

146. *Beales*, 329 Md. at 274, 619 A.2d at 110.

147. *See supra* notes 77-79 and accompanying text.

to tell the truth.[148] Presumably, under rule 1-502, a judge must still make a threshold determination of relevance to truth telling for the lesser crimes.

The type of balancing required for infamous crimes also needs clarification. For example, three equally plausible interpretations of the rule are that (1) the conviction of an infamous crime is admissible only if weighed against some other factor such as remoteness; (2) the tendency of a particular infamous crime to indicate a witness's credibility must be balanced against the need of the introducing party to present the testimony of that witness; or (3) a simple determination of whether the particular infamous crime tends to implicate the credibility of the witness is enough. Justice might well become random if individual judges are permitted to decide whether a particular infamous crime, such as murder, implicates credibility. Rules Committee minutes indicate that judges varied greatly in their opinions regarding impeachment.[149] Despite the concept that impeachment by prior conviction is supposed to be used only when it reflects on the witness's propensity to tell the truth, many judges believe that "[t]here is a serious question as to the credibility of persons who have previously been convicted of a serious crime."[150] Alarmingly, one Rules Committee member thought, for example, that "a husband's murder of his wife may not be evidence of untruthfulness, but since he broke a basic rule of society, he has to suffer the possible consequences of having the conviction used against him in a later case."[151] Moreover, although rule 1-502 does not create a separate category for criminal defendants, some judges believe that defendant witnesses should be treated differently from nondefendant witnesses.[152] It remains unclear what, if any, deference should be given to criminal defendants.[153] Some judges consider limiting instructions sufficient to cure any prejudice, while others believe instructions are not always followed.[154] Clearly the judiciary needs guidance.

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148. *Prout*, 311 Md. at 363, 535 A.2d at 452.

149. Minutes, May 17-18, 1991, at 4-14 & App. 1.

150. *Id.* at 7.

151. *Id.* at 13.

152. *Id.*

153. Minutes, Sept. 8-9, 1990, at 16-36. The problem with having different impeachment rules for defendants is illustrated by the following example: Suppose a husband and wife had been convicted of various crimes together, including writing bad checks and committing robberies. If at a later time the husband is tried for assault and battery on his wife, the wife could be impeached with her convictions but the husband could not. *Id.* at 17.

154. Minutes, May 17-18, 1991, at 9-11.

Furthermore, the court did not instruct trial courts as to how they should demonstratively weigh probative value against unfair prejudice. The *Beales* decision on this issue was unsatisfying because the court seemed to contradict itself. The presumption noted by the court "that judges properly perform their duties"[155] and that "trial judges are not obliged to spell out in words every thought and step of logic,"[156] suggests that almost any indication of a balancing test will suffice. Yet, in its detailed evaluation of the trial judge's conduct, the court seemed to insist that a proper balancing by the trial court be clearly shown.[157]

The court's failure to identify specific factors to be considered in the balancing, and its failure to clarify what evidence of balancing by the trial court it will require, may result in unfair convictions as trial judges balance the consequences of admitting impeachment evidence according to their own standards. Moreover, the lack of guidance left defendants open to needless and costly appeals that may unnecessarily clog the courts with litigation aimed at ascertaining a standard that might just as easily have been stated in *Beales*.

5. Conclusion.—The *Beales* decision represents an important milestone in Maryland's rules of evidence. The Court of Appeals held that, before a trial court may admit evidence of a witness's prior criminal conviction, the judge must balance the probative value of the evidence against its potential for unfair prejudice and that a judge's failure to do so will very rarely constitute harmless error. The court, however, did not sufficiently explain to trial courts how to conduct the requisite balancing or how to indicate to the appellate court's satisfaction that they properly performed the balancing test.

MARION K. GOLDBERG

C. The Prejudicial Impact of Testimony Regarding Accusations of Prior Bad Acts Similar to the Acts for Which the Defendant Is on Trial

In *Medical Mutual Liability Insurance Society of Maryland v. Evans*[1] (*Medical Mutual*), the Court of Appeals found that the prejudice caused by the improper cross-examination of Medical Mutual's former claims manager regarding accusations of prior bad acts similar to the acts for which Medical Mutual was on trial transcended the trial

155. *Beales*, 329 Md. at 273, 616 A.2d at 110.
156. *Id.*
157. *See id.* at 274, 619 A.2d at 110.
1. 330 Md. 1, 622 A.2d 103 (1993).

judge's curative instruction.[2] Consequently, the court held that the trial judge abused his discretion in denying Medical Mutual's motion for mistrial.[3]

In so holding, the court recognized that the decision whether to grant a motion for mistrial rests with the trial judge,[4] but indicated that the judge's discretion is limited when the inadmissible evidence involves accusations of prior bad acts, especially when the prior bad acts are similar to the acts for which the defendant is on trial.[5] In addition, the court urged attorneys to use motions *in limine* to obtain advance rulings on the admissibility of questionable evidence.[6]

1. The Case.—On September 17, 1983, Deborah L. Evans was admitted to Lutheran Hospital for the removal of an intrauterine device (IUD) that had extravasated into her intraperitoneal cavity.[7] In preparation for the surgery, Evans was placed under general anesthesia and monitored by Dr. Clarence E. Beverly.[8] Following the operation, Evans suffered permanent neurological impairment[9] and brought a claim against Beverly in Health Claims Arbitration.[10] She argued that due to Beverly's failure to monitor her adequately during surgery, she suffered a brain injury caused by lack of oxygen.[11] The arbitration panel awarded Evans $500,000; she rejected the award and sought a jury trial in the Circuit Court for Baltimore City.[12] Beverly, who was represented by Medical Mutual, his malpractice insurance carrier, successfully moved to set aside the arbitration panel's award, thereby allowing the trial to proceed as if no award had been granted.[13]

Pending proceedings in the circuit court, counsel for Beverly withdrew and Medical Mutual engaged new counsel on his behalf.[14]

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2. *Id.* at 24, 622 A.2d at 114.

3. *Id.*

4. *Id.* at 19, 622 A.2d at 112.

5. *See id.* at 24, 622 A.2d at 114.

6. *Id.*

7. *Id.* at 6, 622 A.2d at 105.

8. *Id.*

9. *See id.* Evans's condition was characterized by a tremor in her right arm and hand, with numbness and weakness. Her thinking processes and concentration also were impaired. She was unable to continue her teaching job and was determined to be totally disabled by the Social Security Administration. *Id.*

10. *Id.*; *see* MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2A-01 to -09 (1989) (governing Health Claims Arbitration).

11. *Medical Mutual*, 330 Md. at 6, 622 A.2d at 105.

12. *Id.* at 8, 622 A.2d at 106.

13. *Id.* at 8-9, 622 A.2d at 106.

14. *Id.* at 10, 622 A.2d at 107.

During this transition, Evans made a settlement offer of $500,000.[15] Eight days later, after receiving no response from Medical Mutual, Evans increased her demand to "policy limits, if not less than $1 million."[16] Although Beverly implored Medical Mutual to settle within policy limits, Medical Mutual was unable to reach an agreement with Evans.[17]

The case proceeded to trial and the jury returned a verdict of $2.5 million in favor of Evans.[18] Beverly then assigned Evans his claim against Medical Mutual for bad faith failure to settle.[19] This assignment precipitated the instant action before the Court of Appeals.[20]

The initial trial against Medical Mutual for bad faith failure to settle resulted in a mistrial.[21] Retrial began on February 4, 1991, before a jury of eleven women and one man.[22] The motion for mistrial at issue was made on the seventh and last day of testimony.[23] Medical Mutual called as a witness Kenneth Robert Phillips, the claims manager who handled the settlement negotiations with Evans.[24] During cross-examination, Evans's counsel questioned Phillips regarding a previous case, *Thimatariga v. Chambers*,[25] in which he and Phillips had been similarly pitted against each other.[26] *Chambers* involved a malpractice claim against a doctor who removed a young woman's ovaries and uterus without authorization.[27] The questioning inferred that Phillips had valued the woman's loss at only $23,000.[28] Counsel

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15. *Id.*

16. *Id.*

17. *Id.* at 11, 13-14, 622 A.2d at 108-09.

18. *Id.* at 14, 622 A.2d at 109. Medical Mutual paid Evans $1 million, the amount of Beverly's policy, plus interest thereon. *Id.* at 5, 622 A.2d at 104.

19. *Id.* at 14, 622 A.2d at 109. The Court of Appeals upheld the validity of the assignment, noting that "[a]lthough we have not explicitly held that a cause of action for bad faith failure to settle is assignable, the general rule favoring assignability and case law elsewhere support that conclusion." *Id.* at 29, 622 A.2d at 116.

20. *Id.* at 14, 622 A.2d at 109.

21. *Id.* at 15, 622 A.2d at 110. During the initial trial, counsel for Evans elicited testimony indicating that Medical Mutual recently had been involved in another case for bad faith failure to settle. *Id.*, 622 A.2d at 109. The trial judge declared a mistrial because the testimony had robbed Medical Mutual of "an opportunity to fairly present its case." *Id.*, 622 A.2d at 110.

22. *Id.*

23. *Id.*

24. *Id.* at 15-16, 622 A.2d at 110.

25. 46 Md. App. 260, 416 A.2d 1326 (1980).

26. *Medical Mutual*, 330 Md. at 16-17, 622 A.2d at 110-11.

27. *Id.*, 622 A.2d at 110.

28. *Id.* The examination was as follows:

> "Q: Did I not, Mr. Phillips, many years ago, before the Beverly case, call you up involving a case—where suit was brought, where you were the claims manager—of a young woman who claimed that her reproductive organs were re-

for Medical Mutual made a timely objection to the line of questioning, but the trial judge overruled it.[29] Counsel for Evans then inferred Medical Mutual's bad faith in handling the case by pointing out that the *Chambers* jury returned a $1.4 million verdict for the plaintiff, more than $400,000 in excess of the doctor's insurance coverage, which Medical Mutual paid in full.[30]

Following several objections by Medical Mutual, the judge called a bench conference.[31] At that time, Medical Mutual moved for a mistrial.[32] In response, Evans's counsel argued that the line of questioning was admissible to show that Phillips had a personal bias toward him that affected his desire to settle Evans's claim.[33] The trial judge denied the motion for mistrial and permitted counsel for Evans to question Phillips as to a possible bias resulting from the prior case, but not as to the issue of bad faith failure to settle.[34] Before questioning resumed, the judge gave the jury a cautionary instruction intended to cure any prejudice to Medical Mutual.[35]

The jury ultimately returned a verdict in favor of Evans for $1.5 million, the entire amount by which the judgment in the original mal-

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moved over at Bon Secours Hospital without her permission, she was 28 years old, took out her ovaries, her uterus? . . .

. . . .

"Q: And a suit was filed and I called you up, sir, and you said what, asked me what was the demand, and I said the client has advised me she will accept $300,000, and was your response, sir, did you say $23,000? You remember that episode, don't you?"

Id. at 17, 622 A.2d at 110.

29. *Id.*

30. *Id.*, 622 A.2d at 110-11. There was never an adjudication of the bad faith failure to settle issue in *Chambers*. *Id.* at 18, 622 A.2d at 111.

31. Id. at 17, 622 A.2d at 111.

32. *Id.*

33. *Id.*

34. *Id.* at 18, 622 A.2d at 111. The judge distinguished the line of questioning intended to show bias from the one necessitating a mistrial in the initial trial by stating that, in the initial trial, the improper examination "'made a reference to something that in fact had never occurred.'" *Id.* at 19, 622 A.2d at 111.

35. *Id.* at 18, 622 A.2d at 111. The instruction was as follows:

"Ladies and Gentlemen of the Jury, it will be your responsibility to judge this case fairly and impartially by giving each party the benefit of a fair trial. In doing that, you will assess the evidence in this case and determine the facts with regard to this case based on what has been presented to you as to this case.

"We implore you to recall your oath and your responsibilities to assess what did or did not, what has or what has not, what was or was not the facts in this case based on the evidence presented and do that with impartiality, devoid of prejudice, and with fairness to both sides."

Id. at 18-19 n.13, 622 A.2d at 111 n.13.

practice suit exceeded policy limits.[36] The Court of Special Appeals affirmed, and the Court of Appeals subsequently granted Medical Mutual's petition for certiorari.[37]

2. Legal Background.—In Maryland, a witness may be impeached by evidence establishing that the witness has been convicted of a crime "*only* if the crime was an infamous crime or other crime relevant to the witness's credibility and the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party."[38] Under this exclusionary rule,[39] evidence of prior bad acts is generally barred, but may be admitted to establish a material issue in a case.[40]

In *State v. Cox*,[41] the Court of Appeals discussed the admissibility of prior bad acts evidence generally and explained that the law requires a reasonable basis for the introduction of such evidence.[42] A court must assess whether "the primary purpose of the inquiry is . . . to harass or embarrass the witness, and [whether] there is [a] likelihood of obscuring the issue on trial."[43]

The Court of Appeals outlined its position on such evidence in *Kantor v. Ash*[44] by describing instances in which prior bad acts evidence may be admitted. The court stated that a witness "may be cross-examined on such matters and facts as are likely to affect his credibility, test his memory or knowledge, show his relation to the parties or

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36. *Id.* at 5, 622 A.2d at 105. The Court of Appeals affirmed this measure of damages, noting that "[p]resent Maryland law, and the majority rule, is that the measure of damages in a bad faith failure to settle case is the amount by which the judgment rendered in the underlying action exceeds the amount of insurance coverage." *Id.* at 25, 622 A.2d at 114.

37. *Id.* at 5, 622 A.2d at 105.

38. MD. R. 1-502(a) (emphasis added).

39. In Harris v. State, 324 Md. 490, 597 A.2d 956 (1991), the Court of Appeals set forth two reasons why this exclusionary rule is appropriate when considering the admissibility of evidence of prior bad acts. First, it is "the exceptional, and not the usual, case where the evidence of other bad acts is substantially relevant for reasons other than proof of criminal character." *Id.* at 500, 597 A.2d at 961. Second, the exclusionary rule "ensure[s] that adequate consideration [is] given to the conceded, but sometimes overlooked, potential for unfair prejudice that invariably accompanies the introduction of evidence of other bad acts." *Id.*, 597 A.2d at 962. *See generally* Michael P. May, Comment, *Evidence of Other Crimes as Substantive Proof of Guilt in Maryland*, 9 U. BALT. L. REV. 245 (1980) (discussing the operation of the exclusionary rule in Maryland).

40. *See* Ross v. State, 276 Md. 664, 669-70, 350 A.2d 680, 684 (1976). The *Ross* court held that evidence of other crimes may be admissible to establish motive, intent, absence of mistake, a common plan, or identity. *Id.* It further noted that this list of exceptions was not exhaustive. *See id.* at 670, 350 A.2d at 684.

41. 298 Md. 173, 468 A.2d 319 (1983).

42. *Id.* at 179, 468 A.2d at 322.

43. *Id.*

44. 215 Md. 285, 137 A.2d 661 (1958).

the cause, his bias, or the like."[45] The court has recognized, however, that even when there is a permissible purpose for admitting prior bad acts evidence, this type of evidence "carries with it heavy baggage that must be closely scrutinized before admissibility is warranted."[46] In addition, the court has cautioned that where such evidence is admitted for impeachment purposes, *mere accusations* of crime or misconduct may not be used.[47]

When evidence of prior bad acts is improperly admitted at trial, opposing counsel will typically move for a curative instruction or, if the resulting prejudice is overwhelming, for a mistrial. When a motion for mistrial is made, the trial judge must review the circumstances of the particular case and determine whether the prejudicial effect of the inadmissible evidence can be eradicated by a curative instruction or whether a mistrial is required.[48]

In *DeMay v. Carper*,[49] the Court of Appeals held that "only in the exceptional case, the blatant case, will [the trial judge's] choice of cure and his decision as to its effect be reversed on appeal."[50] In *State v. Hawkins*,[51] the court further explained that "[t]he fundamental rationale in leaving the matter of prejudice *vel non* to the sound discretion of the trial judge is that the judge is in the best position to evaluate it."[52] The court noted that "the judge has his finger on the pulse of the trial" because he is able to observe both the demeanor of the witnesses and the reaction of the jurors to the inadmissible evidence.[53]

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45. *Id.* at 290, 137 A.2d at 664.

46. Harris v. State, 324 Md. 490, 500, 597 A.2d 956, 962 (1991).

47. *See* Bonaparte v. Thayer, 95 Md. 548, 559, 52 A. 496, 499 (1902) ("Whatever may be the law elsewhere, the courts of this state have always recognized the distinction . . . between actual misconduct itself, and the charge of misconduct, and have excluded the latter."); *see also* Rainville v. State, 328 Md. 398, 406, 614 A.2d 949, 953 (1992) (holding that evidence that alluded to the defendant's alleged sexual abuse of a child was not admissible in a case involving sexual abuse of another child); Martens Chevrolet, Inc. v. Seney, 292 Md. 328, 340, 439 A.2d 534, 541 (1982) (holding that testimony regarding a previous charge against the defendant for fraud was inadmissible to impeach the witness's credibility in an unrelated civil suit).

48. *See* Kosmas v. State, 316 Md. 587, 594, 560 A.2d 1137, 1141 (1989). Although *Kosmas* is a lie detector case, the factors applied in lie detector cases to decide whether a defendant's right to a fair trial is sufficiently protected by a jury instruction are equally applicable to cases involving prior bad acts evidence. *See Rainville*, 328 Md. at 408, 614 A.2d at 954.

49. 247 Md. 535, 233 A.2d 765 (1967).

50. *Id.* at 540, 233 A.2d at 768.

51. 326 Md. 270, 604 A.2d 489 (1992).

52. *Id.* at 278, 604 A.2d at 493.

53. *Id.*

Appellate review of a trial court's denial of a motion for mistrial generally is limited to whether there was an abuse of discretion.[54] The proper inquiry on appeal is whether the inadmissible evidence was clearly prejudicial to the defendant.[55] The appellate court is not "bound by the trial judge's determination . . . that the remarks were nonprejudicial,"[56] but in *Wilhelm v. State*,[57] the court affirmed the trial court's position of primacy.[58] It held:

> [A] significant factor in determining whether the jury were actually . . . influenced to the prejudice of the [defendant] is whether or not the trial court took any appropriate action, as the exigencies of the situation may have appeared to require, to overcome the likelihood of prejudice, such as informing the jury that the remark was improper, striking the remark and admonishing the jury to disregard it.[59]

If the reviewing court finds that the trial court's curative action was sufficient, the judgment will not be reversed.[60]

In *Guesfeird v. State*,[61] the Court of Appeals set forth several factors that appellate courts should consider when determining the prejudicial impact of inadmissible evidence.[62] These factors include:

> [W]hether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a cru-

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54. *Id.* at 277, 604 A.2d at 493; *see also* Hickman v. State, 76 Md. App. 111, 120, 543 A.2d 870, 875 (1988) (holding that when an improper question is admitted, the appellate court should defer to the trial court's judgment, "since the trial judge is in the best position to evaluate the effect of the question on the jury").

55. *See* Rainville v. State, 328 Md. 398, 408, 614 A.2d 949, 953 (1992) ("'[T]he question is one of prejudice to the defendant.'") (quoting *Hawkins*, 326 Md. at 276, 604 A.2d at 492); *see also* Guesfeird v. State, 300 Md. 653, 658, 480 A.2d 800, 802-03 (1984) (explaining that the "ultimate question" on appeal was whether the testimony regarding the witness's taking of a lie detector test was so clearly prejudicial that a motion for a mistrial should have been granted); *Hawkins*, 326 Md. at 278-79, 604 A.2d at 494 (holding that "[i]n the light of the lack of prejudice, there was no abuse of discretion in the denial of the motion for a mistrial" by the trial judge).

56. Wilhelm v. State, 272 Md. 404, 430, 326 A.2d 707, 724 (1974).

57. *Id.*

58. *Id.* at 423-24, 326 A.2d at 720.

59. *Id.*

60. *Id.* at 424, 326 A.2d at 720.

61. 300 Md. 653, 480 A.2d 800 (1984).

62. *Id.* at 659, 480 A.2d at 803.

> cial issue; [and] whether a great deal of other evidence exists . . . .[63]

The court specified, however, that "[n]o single factor is determinative in any case."[64] Furthermore, it explained that the factors do not constitute an exclusive test, but serve only to guide the judge in determining whether the defendant was prejudiced.[65]

3. The Court's Reasoning.—In *Medical Mutual*, the Court of Appeals examined the scope of the trial judge's discretion to deny a motion for mistrial when inadmissible evidence of prior bad acts similar to the act for which the defendant is on trial has been admitted.[66] Judge Rodowsky, writing for the majority, began the opinion by setting forth the standard that appellate courts should use when determining whether the trial court abused its discretion in denying a motion for mistrial.[67] The court stated that "[t]he question is one of prejudice."[68] If the prejudicial effect of the inadmissible evidence outweighs the curative effect of the instruction to the jury, the trial judge's denial of a motion for mistrial should be reversed.[69]

The court then discussed the admissibility of the evidence elicited by Evans's counsel on cross-examination of Phillips.[70] First, the court considered whether a reasonable basis existed for admitting the testimony regarding the *Chambers* case.[71] At trial, Evans's counsel argued that the primary purpose for admitting the *Chambers* evidence was to establish that he and Phillips had battled often over the years and that Phillips had a personal bias toward him.[72] The court found that even if it assumed bias was a reasonable basis for admitting the evidence,[73] the testimony actually admitted went beyond the issue of bias and improperly tended to establish that Medical Mutual was guilty in *Cham-*

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63. *Id.* Although the factors set forth in *Guesfeird* were specifically designed to weigh the prejudicial effect of inadmissible testimony regarding lie detector tests, the Court of Appeals has stated that those factors "are equally applicable for purposes of deciding whether [a defendant's] right to a fair trial was adequately protected by a jury instruction following a different kind of inadmissible and prejudicial testimony." Rainville v. State, 328 Md. 398, 408, 614 A.2d 949, 954 (1992).

64. *Guesfeird*, 300 Md. at 659, 480 A.2d at 803.

65. *Id.*

66. *Medical Mutual*, 330 Md. at 14, 622 A.2d at 109.

67. *Id.* at 19, 622 A.2d at 112.

68. *Id.*

69. *Id.*

70. *See id.* at 20-22, 622 A.2d at 112-13.

71. *Id.* at 20, 622 A.2d at 112.

72. *See id.* at 16-17, 622 A.2d at 110-11.

73. *See supra* notes 45-47 and accompanying text.

bers of bad faith failure to settle.[74] The court held that "[t]here was *no basis* for referring to Med Mutual's payment of 'the additional money' in *Chambers* on an assigned claim of bad faith failure to settle . . . ."[75] It further noted that such evidence could not be used for impeachment purposes because the question of bad faith in *Chambers* had never been adjudicated.[76] The court concluded that Evans's counsel's statement that Phillips had valued the unauthorized removal of the young woman's ovaries and uterus at only $23,000 demonstrated that the primary purpose of the questioning was to embarrass and harass the witness.[77]

Next, the court balanced the prejudicial effect and probative value of the evidence.[78] It agreed with the trial judge's observation that the reference to a bad faith suit and its subsequent settlement may be more prejudicial than probative and determined that it should have guided his decision in favor of a mistrial.[79] The court reasoned that serious prejudice resulted because "[m]any lay persons would consider that, if Med Mutual refused to protect another insured by failing, in bad faith, to settle within policy limits in a different case, it would be more likely that Med Mutual failed in bad faith to protect Beverly's interest."[80]

After determining that the prior bad acts evidence was both "irrelevant *and* prejudicial,"[81] the court reviewed factors relied on in previous cases to determine the extent of the prejudicial effect resulting from the admission of evidence.[82] First, the court recognized that "[r]eference to the purported, but dramatic, facts of *Chambers* served to obscure the real issue" in the case[83] and found that the confusion of issues was exacerbated by the fact that *Medical Mutual* was already a

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74. *Medical Mutual*, 330 Md. at 20, 622 A.2d at 112.

75. *Id.* (emphasis added).

76. *Id.* at 21-22, 622 A.2d at 112-13.

77. *Id.*, 622 A.2d at 113. The court's conclusion is especially apparent in light of the composition of the jury, which included 11 women, 10 of whom were at or below the age of 40. *See id.* at 15, 622 A.2d at 110.

78. *See id.* at 21, 622 A.2d at 112-13.

79. *Id.*, 622 A.2d at 112.

80. *Id.*

81. *Id.*

82. *Id.* at 22-24, 622 A.2d at 113-14; *see also* Guesfeird v. State, 300 Md. 653, 659, 480 A.2d 800, 803 (1984) (setting forth several factors a court should consider when determining the prejudicial impact of inadmissible evidence).

83. *Medical Mutual*, 330 Md. at 22, 622 A.2d at 113; *see also* State v. Cox, 298 Md. 173, 179, 468 A.2d 319, 321-22 (1983) (stating that a witness may be cross-examined about relevant prior bad acts as long as the trial judge is satisfied that "there is a reasonable basis for the question . . . and that there is little likelihood of obscuring the issue on trial").

difficult case for the jury.[84] The court pointed out that, since jury members sent twenty-two notes asking questions and requesting clarification during the trial, the trial judge "had ample indicia that the jury had difficulty in keeping focused on that which was relevant to the issue to be decided."[85]

The court also considered it significant that Phillips did not accidently blurt out the evidence at issue, but that Evans's counsel apparently prepared questions in advance aimed at eliciting it.[86] The court held that "[e]ven the most intense and dedicated advocate would recognize the likely inadmissibility of, and the potential for a mistrial caused by a reference to, an allegedly bad faith failure to settle in a collateral matter."[87] In a case involving such evidence, contemporary practice recognizes the need for counsel to make a motion *in limine*, which allows the trial judge to rule on the admissibility of evidence that might otherwise lead to a mistrial.[88] Evans's counsel, the court indicated, should have been particularly aware of the need to make such a motion, in light of the fact that the initial trial was aborted as a result of his improper questioning of a witness.[89]

Judge Bell, dissenting in part and concurring in part, criticized what he described as the majority's failure to "defer[ ] to the trial court's superior position to gauge the mood and tone of the trial."[90] He emphasized that the decision whether to grant a motion for mistrial is the trial judge's and that appellate review is limited to whether the judge's ruling was an abuse of discretion.[91] Asserting generally that trial judges are men and women of discernment who know the law and how to apply it correctly,[92] Judge Bell pointed out that the trial judge in *Medical Mutual* thoroughly considered whether to grant the motion for mistrial.[93] Judge Bell further noted that the offending evidence was referred to only once and that the trial judge promptly

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84. *Medical Mutual*, 330 Md. at 22, 622 A.2d at 113.

85. *Id.* at 22-23, 622 A.2d at 113.

86. *Id.* at 24, 622 A.2d at 114.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 33, 622 A.2d at 118 (Bell, J., dissenting and concurring).

91. *Id.*, 622 A.2d at 118-19 (Bell, J., dissenting and concurring).

92. *Id.* at 34, 622 A.2d at 119 (Bell, J., dissenting and concurring).

93. *See id.* at 35-37, 622 A.2d at 119-20 (Bell, J., dissenting and concurring). The trial judge heard extensive argument both in and outside the presence of the jury. *Id.* at 36, 622 A.2d at 120 (Bell, J., dissenting and concurring). Furthermore, the trial judge reviewed Medical Mutual's motion for mistrial twice. *Id.* at 37, 622 A.2d at 120 (Bell, J., dissenting and concurring).

made a curative instruction.[94] Accordingly, Judge Bell argued that the court should have exercised more restraint in reviewing the trial judge's decision.[95]

4. Analysis.—The court's holding in *Medical Mutual* reflects a trend toward limiting the trial judge's discretion to deny motions for mistrials in cases involving the improper admission of evidence of prior bad acts similar to the acts for which the defendant is on trial. Moreover, the court indicated that it would be especially strict when the elicited testimony relates to mere accusations as opposed to verified facts.[96] This imposition of restraint on the trial judge's discretion is a reaction to the highly prejudicial character of this type of evidence and the difficulty of alleviating such prejudice through a curative instruction. Ultimately, the court advocated the use of the motion *in limine* to obtain an advance judicial ruling on the admissibility of such evidence.[97]

The *Medical Mutual* decision suggests that evidence regarding mere accusations of prior bad acts similar to the acts for which the defendant is on trial is more prejudicial than other forms of prior bad acts testimony. Reading *Medical Mutual* in conjunction with the holding in *Rainville v. State*,[98] the trend in this area of law is clear. In *Rainville*, the court stated that a witness's remark regarding a prior similar offense by the defendant had "great potential for prejudicing the jury"[99] because evidence of "a prior conviction which is similar to the crime for which the defendant is on trial may have a tendency to suggest to the jury that if the defendant did it before he probably did it this time."[100] Moreover, the court found the reference to prior bad acts in that case "particularly prejudicial" because the defendant had not been convicted of the prior acts.[101] As in *Rainville*, the inadmissible testimony in *Medical Mutual* consisted of a mere accusation.[102]

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94. *See id.* at 37-38, 622 A.2d at 120-21 (Bell, J., dissenting and concurring).

95. *Id.* at 38-39, 622 A.2d at 121 (Bell, J., dissenting and concurring).

96. *See id.* at 20-21, 622 A.2d at 112.

97. *Id.* at 24, 622 A.2d at 114.

98. 328 Md. 398, 614 A.2d 949 (1992). In *Rainville*, the defendant was on trial for the alleged sexual abuse of a seven-year-old girl. *Id.* at 399, 614 A.2d at 949. Just prior to the girl's report of the abuse, the defendant was arrested for a third degree sexual offense and battery of the girl's brother. *Id.* at 400, 614 A.2d at 950. During direct examination, the mother of the victim testified that the girl told her of the sexual abuse while the defendant was "in jail for what he had done to [her brother]." *Id.* at 399, 614 A.2d at 949.

99. *Id.* at 407, 614 A.2d at 953.

100. *Id. (quoting* Prout v. State, 311 Md. 348, 364, 535 A.2d 445, 453 (1988)).

101. *Id.* at 407, 614 A.2d at 953.

102. *See Medical Mutual*, 330 Md. at 21-22, 622 A.2d at 112-13.

The court held admission of such unsubstantiated testimony so prejudicial that it was an abuse of discretion for the trial judge to deny Medical Mutual's motion for mistrial.[103]

The court's view of the heightened potential for prejudice resulting from the admission of accusations of prior bad acts similar to the acts for which the defendant is on trial is comparable to its view of the highly prejudicial character of evidence regarding lie detector tests.[104] Although reference to a lie detector test is not always so prejudicial as to warrant a mistrial, the Court of Appeals has held that a motion for mistrial should be granted if the result of the test can be inferred and the inference is substantially prejudicial to the defendant's case.[105] The court has stated that "[s]imply putting before the jury the fact that a lie detector test was taken can be the equivalent of revealing the results."[106]

The rationale for granting a motion for mistrial in lie detector cases is that there is a strong possibility that a jury will make an improper inference from the evidence.[107] The jury might infer that the witness took the test and passed and is, therefore, telling the truth, or that the defendant took the test and failed and is, therefore, guilty.[108] Once members of the jury have drawn such an inference, the risk that they will not, or cannot, follow a curative instruction directing them to disregard the evidence is so great that a mistrial is the only way to ensure a fair proceeding.[109]

The rationale underlying the court's approach to admitting evidence of lie detector tests is also applicable to cases involving accusations of prior bad acts similar to the acts for which the defendant is on trial. When this form of evidence is admitted at trial, the jury may draw two types of inferences prejudicial to the defendant. First, the jury may infer that the defendant actually committed the prior bad act, even though that issue has never been adjudicated.[110] Second, the jury may "infer that the [defendant] is a 'bad man' who should be punished regardless of his guilt of the charged crime, or . . . that he

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103. *Id.* at 24, 622 A.2d at 114.

104. *See supra* note 63.

105. *See* Guesfeird v. State, 300 Md. 653, 659, 480 A.2d 800, 803 (1984).

106. *Id.* at 661, 480 A.2d at 804.

107. *See id.* at 661-62, 480 A.2d at 804.

108. *See id.* at 661, 480 A.2d at 804.

109. *See id.* at 666-67, 480 A.2d at 807.

110. *See* Rainville v. State, 328 Md. 398, 407, 614 A.2d 949, 953 (1992). In *Rainville*, the court recognized that "it is highly likely that the jury assumed that 'what [the defendant] had done to [the victim's brother]' was a crime similar to the alleged crimes" against the young girl. *Id.*

committed the charged crime due to a criminal disposition" or propensity.[111] Because the jury will likely draw these inferences as soon as the accusations of similar prior bad acts are made and because the resulting prejudice is so unfair, the court has correctly realized that it would be difficult to eradicate the prejudice effectively through a curative instruction.[112] In *Rainville*, the court stated that it was "highly probable" that such evidence has "such a devastating and pervasive effect that *no* curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant."[113] Thus, the judge's discretion to deny a mistrial in such a case is limited.

The *Medical Mutual* court also advised attorneys that, in cases involving accusations of prior bad acts similar to the acts for which the defendant is on trial, they should make motions *in limine* to secure advance rulings on whether the proposed testimony is admissible.[114] By so doing, they could avoid causing many unnecessary mistrials.[115] The decision in *Medical Mutual* is a warning to attorneys that Maryland courts are growing increasingly intolerant of attorneys who sidestep the rules of evidence by attempting to admit evidence of prior bad acts. This intolerance is especially severe in cases involving mere accusations of prior bad acts similar to the acts for which the defendant is on trial because of the strong possibility that the resulting prejudice can only be cured by a mistrial.

5. Conclusion.—The court's holding in *Medical Mutual* re-emphasizes the highly prejudicial character of evidence regarding accusations of prior bad acts similar to the acts for which the defendant is on trial. Recent Court of Appeals holdings suggest that the trial judge's discretion to deny a motion for a mistrial in cases in which such evidence is improperly admitted is limited, because it is almost impossible to eliminate the prejudice through less drastic means. Ultimately, Maryland practitioners must be aware that the courts are impatient with those who knowingly attempt to admit improper testimony. In the wake of *Medical Mutual*, attorneys who fail to use motions *in limine*

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111. *See* Acuna v. State, 332 Md. 65, 74, 629 A.2d 1233, 1237 (1993); *see also Medical Mutual*, 330 Md. at 21, 622 A.2d at 112 (stating that the jury may infer from the inadmissible evidence that "if Med Mutual refused to protect another insured by failing, in bad faith, to settle within policy limits in a different case, it would be more likely that Med Mutual failed in bad faith to protect Beverly's interest").

112. *See Medical Mutual*, 330 Md. at 24, 622 A.2d at 114.

113. *Rainville*, 328 Md. at 411, 614 A.2d at 955 (emphasis added).

114. *See Medical Mutual*, 330 Md. at 24, 622 A.2d at 114.

115. *See id.*

to obtain advance judicial rulings on the admissibility of such evidence will find little sympathy on the Maryland bench.

ANDREA SAUM-ECHEVERIO

VIII. FAMILY LAW

A. Contempt Power in Child Support Arrearage Enforcement

In *Middleton v. Middleton*,[1] the Court of Appeals held that because a parent's child support obligation is not a debt within the meaning of article III, section 38 of the Maryland Constitution,[2] a defaulting parent's obligation may be enforced through a court's contempt power, including imprisonment, until the default is purged.[3] The court further held that it is the "essential nature" of the obligation that determines the reach of section 38, not the method of support enforcement.[4] In reaching its decision, the court sought to clarify Maryland constitutional jurisprudence, case law, and statutory provisions regarding child support enforcement. It succeeded in defining the boundaries of power available to Maryland courts when enforcing child support obligations.

1. The Case.—Brian and Crystal Middleton married on April 27, 1987.[5] They separated after two and one-half years and entered into a consent order on child support, custody, and visitation.[6] Under the terms of the consent order, Mrs. Middleton received temporary custody of their minor child, and Mr. Middleton was to make weekly support payments of seventy-five dollars.[7]

After a short time, Mr. Middleton stopped making the payments.[8] Consequently, Mrs. Middleton filed a motion for contempt and other relief.[9] The trial court held a hearing and found Brian Middleton in civil contempt for not making support payments.[10] Instead of making an immediate disposition, however, the court scheduled a review hear-

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1. 329 Md. 627, 620 A.2d 1363 (1993).

2. *Id.* at 639, 620 A.2d at 1369. Section 38 of the Constitution provides in pertinent part:

> No person shall be imprisoned for debt, but a valid decree of a court of competent jurisdiction or agreement approved by decree of said court for the support of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony (either common law or as defined by statute), shall not constitute a debt within the meaning of this section.

MD. CONST. art. III, § 38.

3. *Middleton*, 329 Md. at 639, 620 A.2d at 1369.

4. *Id.* at 638-39, 620 A.2d at 1369.

5. *Id.* at 637, 620 A.2d at 1368.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

ing to allow Mr. Middleton an opportunity to purge the contempt.[11] When he failed to show up for the hearing, the court issued a body attachment.[12] The court then granted Crystal Middleton a divorce, incorporating in it the previous consent orders governing support, custody, and visitation.[13] It also reduced to a judgment the then outstanding child support arrears.[14]

Upon locating Mr. Middleton, the court reactivated his child support payment obligations and issued a wage withholding order.[15] Mrs. Middleton then sought payment of the accrued arrears via the court's contempt powers.[16] After another hearing, the court ruled that Mr. Middleton's support arrears had been reduced to a judgment. Therefore, he could not be held in contempt for failure to pay them.[17] According to the court, ruling otherwise would subject Mr. Middleton to possible imprisonment for his financial obligation, in violation of article III, section 38 of the Maryland Constitution.[18] The court therefore denied Mrs. Middleton's motion with prejudice.[19] Prior to consideration by the Court of Special Appeals, the Court of Appeals issued a writ of certiorari on its own motion to hear the case.[20]

2. Legal Background.—The Maryland Constitution first prohibited imprisonment for failure to pay a debt in 1851.[21] The meaning of the term "debt," however, was not clarified for family law purposes until 1950, when section 38 of article III was amended to include a child support exclusion.[22] It stated that "a valid decree of a court of competent jurisdiction or agreement approved by decree of said court

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11. *Id.* at 637-38, 620 A.2d at 1368.

12. *Id.* at 638, 620 A.2d at 1368.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* at 642, 620 A.2d at 1370. The trial judge stated:

> So that my ruling is clear, I am not ruling whatsoever that Mr. Middleton is not in contempt of court. I am ruling just the contrary. He is indeed in contempt of court, but on account of the money judgment that has come into existence, I am satisfied that Maryland law does not permit this plaintiff to take advantage of the contempt sanction.

Id.

19. *Id.* at 638, 620 A.2d at 1368.

20. *Id.*

21. Brown v. Brown, 287 Md. 273, 277 n.2, 412 A.2d 396, 398 n.2 (1980). The prohibition first appeared in article III, § 44 of the Constitution of 1851. *Id.*

22. *Id.*

for the support of . . . dependent children . . . shall not constitute a debt within the meaning of this section."[23]

Even before this amendment, the case law regarding section 38 distinguished the concepts of "debt" and "duty."[24] In *State v. Mace*,[25] the first Court of Appeals decision interpreting section 38, the court held that the definition of "debt" did not include fines or penalties for violations of public law.[26] Later, in *Dickey v. Dickey*,[27] the court distinguished between debt and duty in the context of a domestic relations case and held that the obligation to pay alimony is a duty, not a debt.[28] Since that decision, the Court of Appeals consistently has held that fathers and mothers have a common law duty to support their minor children.[29] Moreover, section 5-203(b)(1) of the Family Law Article states that parents of a minor child "are jointly and severally responsible for the child's support, care, nurture, welfare and educa-

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23. *Id.* In 1962, the exclusionary provision's definition of children expanded to include those born illegitimately. *Id.* Section 38 was last amended in 1982. That amendment explained the meaning of alimony and made clear that the child support provision is gender neutral. *Middleton*, 329 Md. at 629 n.1, 620 A.2d at 1364 n.1.

24. *Brown*, 287 Md. at 280, 412 A.2d at 400.

25. 5 Md. 337 (1854).

26. *Id.* at 351. The court stated that "[t]he evident intention of the Constitution was to relieve those who could not pay their debts, and not to shield from punishment those who had violated the public law." *Id.* Attention to the difference between the financially incapacitated and those seeking absolution from legitimate responsibilities increased as case law regarding the scope of § 38 developed. *See, e.g.*, Ruggles v. State, 120 Md. 553, 564, 87 A. 1080, 1084 (1913) (holding that imprisonment for failing to pay a motor vehicle fine is not imprisonment for debt); State v. Nicholson, 67 Md. 1, 3, 8 A. 817, 818 (1897) (holding that the imprisonment of a tax collector for failing to pay collected taxes to the State is not imprisonment for debt).

27. 154 Md. 675, 141 A. 387 (1928).

28. *Id.* at 681, 141 A. at 390. The court stated:

> The obligation to pay alimony in a divorce proceeding is not regarded as a debt but a duty growing out of the marital relation and resting upon a sound public policy, and so this obligation may be enforced by attachment of the person for contempt, and the defendant may be imprisoned unless he can purge himself of the contempt by paying or showing that he has neither the estate nor the ability to pay.

Id.

29. *See, e.g.*, Carroll County v. Edelmann, 320 Md. 150, 170, 577 A.2d 14, 23 (1990) (asserting that parenthood, by nature and law, imposes an obligation to support minor children); Knill v. Knill, 306 Md. 527, 531, 510 A.2d 546, 548 (1986) (noting that "a long line of Maryland cases places the responsibility of child support squarely upon the shoulders of the natural parents"); Kerr v. Kerr, 287 Md. 363, 367, 412 A.2d 1001, 1004 (1980) (stating that supporting their dependent children is the duty of the father and mother); Kriedo v. Kriedo, 159 Md. 229, 231, 150 A. 720, 721 (1930) ("It is settled in this state that a father is under the common law obligation to support a minor child . . . .").

tion . . . ."[30] In addition, section 10-203 makes it a misdemeanor for a parent deliberately to fail to support a minor child.[31]

The Supreme Court and Congress also characterize child support as a duty rather than a debt. In *Wetmore v. Markoe*,[32] for example, the Supreme Court stated that "a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but rather a legal means of enforcing the obligation of a husband and father to support and maintain his wife and children."[33] Congress recognized the distinction in seeking enforcement of child support obligations under Title IV-D of the Social Security Act.[34] As the legislative history of Title IV-D demonstrates, Congress considered children to have a "right" to support and parents to have a duty to provide it.[35]

3. The Court's Reasoning; Analysis.—In concluding that child support obligations may be enforced by a court's contempt powers, the *Middleton* court emphasized that under the 1950 amendment to section 38, child support obligations do not constitute debt.[36] Thus, according to the court, the amendment also allows courts "to enforce by imprisonment, if need be, the *legal* and *moral* obligation of support . . .

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30. MD. CODE ANN., FAM. LAW § 5-203(b)(1) (1991). This provision, first enacted by the legislature in 1929, originally charged both parents with the "care, nurture, welfare and education of their minor child." *Middleton*, 329 Md. at 633, 620 A.2d at 1366. Parents became "jointly and severally" responsible for child support under a 1951 amendment. *Id.*

31. Section 10-203 states in part:

> (a) *Failing to support minor child.*—A parent may not willfully fail to provide for the support of his or her minor child.
>
> (c) *Penalties.*—An individual who violates this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $100 or imprisonment not exceeding 3 years or both.

MD. CODE ANN., FAM. LAW § 10-203 (1991).

32. 196 U.S. 68 (1904).

33. *Id.* at 74; *see also* Dunbar v. Dunbar, 190 U.S. 340, 351 (1903) (stating that it was not the intention of Congress in passing a bankruptcy act to provide for discharge of the father's child support obligation).

34. *See* 42 U.S.C. §§ 651-662 (1988). Section 651 provides in part:

> For the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support . . . there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

Id. § 651; *see also* Wehunt v. Ledbetter, 875 F.2d 1558, 1569-70 (11th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990) (Clark, J., dissenting) (stating that the Social Security Amendments of 1974, 1984, and 1988 were designed to strengthen the effectiveness of federal child support enforcement efforts).

35. *Wehunt*, 875 F.2d at 1573 (Clark, J., dissenting).

36. *Middleton*, 329 Md. at 629, 620 A.2d at 1364.

that parents owe to their children."[37] Noting that support is a lasting obligation, the court simply dismissed as immaterial the issue of whether or not the obligation was reduced to a judgment.[38]

The court traced the rise of constitutional jurisprudence distinguishing between a "debt" as defined by section 38 and a "duty" under the law.[39] In discussing the debt/duty distinction, the court noted that although many courts considered child support a duty prior to the 1950 amendment,[40] they did not apply this principle uniformly.[41] The 1950 amendment and its subsequent modifications made the distinction a constitutional mandate.[42] Capitalizing on the constitutional exception carved out for child support, the court cited numerous examples of cases[43] that reinforced its conclusion that parental support is "simply a natural and legal duty."[44] It further noted that it may not be performed at whim[45] or be avoided because the child is illegitimate.[46]

Central to the court's reasoning was the principle that "[i]t is the substance of the obligation that the monetary claim represents, not the form that it takes, that is dispositive."[47] Thus, the court patently rejected the trial court's ruling that once accrued support arrearages were reduced to a judgment, a court could no longer use its contempt powers against the parent because doing so might lead to imprisonment for a "debt."[48] The court explained:

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37. *Id.* at 630, 620 A.2d at 1364 (quoting Brown v. Brown, 287 Md. 273, 283, 412 A.2d 396, 401 (1980)).

38. *See id.* at 639, 620 A.2d at 1369.

39. *Id.* at 629-31, 620 A.2d at 1364-65 (citing *Brown*, 287 Md. at 278-85, 412 A.2d at 399-403).

40. *Id.* at 631-32, 620 A.2d at 1365.

41. *Brown*, 287 Md. at 281, 412 A.2d at 400-01. *Compare* Blades v. Szatai, 151 Md. 644, 647, 135 A. 841, 842 (1927) (holding that child support is a common law duty of the father) *with* Bushman v. Bushman, 157 Md. 166, 171, 145 A. 488, 491 (1929) (holding that child support is a debt within the meaning of the constitutional imprisonment prohibition).

42. *See Brown*, 287 Md. at 281-82, 412 A.2d at 401.

43. *See* cases cited *supra* note 29.

44. *Middleton*, 329 Md. at 632, 620 A.2d at 1365 (quoting *Blades*, 151 Md. at 654, 135 A. at 845).

45. Palmer v. State, 223 Md. 341, 351, 164 A.2d 467, 473 (1960).

46. Virginia v. Autry, 293 Md. 53, 61, 441 A.2d 1056, 1060 (1982).

47. *Middleton*, 329 Md. at 633, 620 A.2d at 1366. The court analogized the substance of the obligation examination to the theory underlying marital property division. "[A]lthough it may have been used for marital purposes, property acquired by one spouse before the marriage, by inheritance or gift, excluded by valid agreement or directly traceable to any of those sources retains its character as nonmarital property." *Id.* at 633-34 n.2, 620 A.2d at 1366 n.2.

48. *Id.* at 639, 620 A.2d at 1369.

> [T]he reach of the constitutional provision is not determined, nor meant to be, by the method chosen to enforce the child support claim. The determination whether a particular obligation constitutes a debt within the contemplation of the constitutional provision depends upon the essential nature of that obligation. Once the nature of that obligation has been determined, the provision's reach has also been determined.[49]

Recent decisions by sister courts on this issue strengthened the Court of Appeals's resolve.[50] For example, in 1990 the Florida Supreme Court rejected the argument that reducing a support decree to a money judgment "transforms the obligation it represents into an ordinary judgment debt, enforceable only by an action at law."[51] Like the Court of Appeals, the *Gibson* court stressed that child support, a parent's moral and legal duty, is distinguishable from a judgment for money or property.[52] Practical considerations also motivated its decision:

> The courts have a duty to provide an effective, realistic means for enforcing a support order, or the parent or former spouse for all practical purposes becomes immune from an order for support. In our view, this duty includes enforcement of a judgment of support by equitable processes of the court because a remedy at law that is ineffective in practice is not an adequate remedy.[53]

Acknowledging similar concerns, the *Middleton* court insisted that the framers of the 1950 amendment intended courts to use their contempt power to enforce child support obligations.[54] Therefore, the court structured its decision as a further enunciation of established precedent.[55] Given that legislative and judicial action firmly established child support as a duty and not a debt, the *Middleton* decision

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49. *Id.* at 638-39, 620 A.2d at 1369.

50. *See, e.g.*, Gibson v. Bennett, 561 So. 2d 565, 569 (Fla. 1990) ("A decree for support is different than a judgment for money or property: It is a continuing obligation based on the moral as well as legal duty of a parent."); *Ex parte* Wilbanks, 722 S.W.2d 221, 224 (Tex. Ct. App. 1986) ("[E]ven though the amount of child support arrearage may be reduced to judgment, neither that judgment nor the constitutional prohibition against imprisonment for debt is a bar to enforcing the child support order by contempt and confinement until the arrearage is paid.").

51. *Gibson*, 561 So. 2d. at 568.

52. *Id.*

53. *Id.* at 570.

54. *See Middleton*, 329 Md. at 639, 620 A.2d at 1369.

55. *Id.* at 629-41, 620 A.2d 1364-70.

fits well into the post-1950 body of case law regarding child support.[56] Had the court decided that support obligations could be "converted, by the enforcement method chosen, from a duty to a mere debt,"[57] it would have indicated that only sometimes is child support a duty and created a large loophole for defaulting parents.

On the contrary, the court took the opportunity to send a message to defaulting parents that child support obligations will be strictly enforced. Under *Middleton*, it is clear that parents who, without excuse or justification, ignore their court-ordered child support obligations may be held in contempt.[58] The court's primary concern, however, was for the welfare of Maryland's children, not the punishment of their parents.[59] Aware that the state could become burdened with the responsibility of supporting children whose parents have neglected them,[60] the court sought to ensure that courts will have the requisite power to enforce support obligations. Consequently, when a court seeks collection of child support arrearages in the future, it may exercise its contempt power, complete with the threat of imprisonment, to achieve compliance.

4. Conclusion.—In holding that a defaulting parent's support obligation may be enforced by a court's contempt power, whether or not the obligation has been reduced to a judgment, the *Middleton* decision underscored the significance that the Maryland courts and leg-

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56. *See supra* note 29.

57. *Middleton*, 329 Md. at 638, 620 A.2d at 1368.

58. The trial court found that Mr. Middleton had the ability to pay support but had "contemptuously" acknowledged the court's order. *Id.* at 641-42, 620 A.2d at 1370 (quoting the trial judge).

59. The court explained that "[p]ermitting a parent's child support obligations to be enforced by contempt and, if necessary, imprisonment, is consistent with this State's policy of insuring that child support obligations are met and met to the extent necessary for the well-being of the child." *Id.* at 640, 620 A.2d at 1369; *see also* Stambaugh v. Child Support Admin., 323 Md. 106, 111, 591 A.2d 501, 503 (1991) (holding that an agreement under which a mother agreed to waive the liability of a father for child support payments violated public policy and was invalid); Virginia v. Autry, 293 Md. 53, 57, 441 A.2d 1056, 1058 (1982) (stating that one of the purposes of the Uniform Reciprocal Enforcement of Support Act "is to provide liberal enforcement in Maryland of the claims of non-resident parents and children entitled to support"); Pope v. Pope, 283 Md. 531, 533, 390 A.2d 1128, 1130 (1978) (stating that a lien may be placed on unemployment benefits for the purpose of obtaining child support payments in default); Lieberman v. Lieberman, 81 Md. App. 575, 588, 568 A.2d 1157, 1163 (1990) ("A parent cannot agree to preclude a child's right to support by the other parent, or the right to have that support modified in appropriate circumstances. The State has a vested interest in requiring a responsible parent to support his or her child.").

60. *Middleton*, 329 Md. at 641, 620 A.2d at 1370 (citing *Lieberman*, 81 Md. App. at 588, 568 A.2d at 1163).

islature traditionally have recognized in child support issues. By the sheer weight of legal precedent, the court disposed of any residual notions that child support is, or could be, considered a debt. In the future, courts will feel free to protect the welfare of Maryland's children by exercising contempt power on defaulting parents.

VERONICA P. JONES

B. *Judicial Distribution of Marital Property Acquired After Separation*

In *Alston v. Alston*,[1] the Court of Appeals held that equally dividing an item of marital property, acquired entirely through the effort and resources of one spouse after a separation, is inequitable.[2] The court determined that an equal division in such circumstances is contrary to the intent of section 8-205 of the Family Law Article.[3] Specifi-

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1. 331 Md. 496, 629 A.2d 70 (1993).
2. *Id.* at 507, 629 A.2d at 76.
3. *Id.*; *see* MD. CODE ANN., FAM. LAW §§ 8-201 to -205 (1991). Section 8-205 provides:
(a) *Grant of award.*—Subject to the provisions of subsection (b) of this section, after the court determines which property is marital property, and the value of the marital property, the court may transfer ownership of an interest in a pension, retirement, profit sharing, or deferred compensation plan from one party to either or both parties, grant a monetary award, or both, as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded.
(b) *Factors in determining amount and method of payment or terms of transfer.*—The court shall determine the amount and the method of payment of a monetary award, or the terms of the transfer of the interest in the pension, retirement, profit sharing, or deferred compensation plan, or both, after considering each of the following factors:
(1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
(2) the value of all property interests of each party;
(3) the economic circumstances of each party at the time the award is to be made;
(4) the circumstances that contributed to the estrangement of the parties;
(5) the duration of the marriage;
(6) the age of each party;
(7) the physical and mental condition of each party;
(8) how and when specific marital property or interest in the pension, retirement, profit sharing, or deferred compensation plan, was acquired, including the effort expended by each party in accumulating the marital property or the interest in the pension, retirement, profit sharing, or deferred compensation plan, or both;
(9) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
(10) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in the pension, retirement, profit sharing, or deferred compensation plan, or both.

cally, it ruled that in cases in which property is acquired after a separation, "greater weight" must be given to "how and when specific marital property . . . was acquired, including the effort expended by each party in accumulating the marital property,"[4] than to the other factors listed in section 8-205(b).[5] By emphasizing that the General Assembly originally intended marital property to be equitably distributed, the court changed the process by which Maryland courts divide marital property independently acquired after separation.[6]

1. The Case.—Viola and Herman Alston separated in 1985 after twenty-one years of marriage.[7] In November 1987, Mrs. Alston filed a complaint for divorce in the Circuit Court for Baltimore City based on the couple's voluntary separation for over a year.[8] In her complaint, she asked for neither alimony nor a marital property award.[9] Although served and notified that a divorce could be granted if he did not file an answer within thirty days, Mr. Alston did not respond and assumed that the divorce was granted.[10] Coincidentally, several days before the expiration of the thirty-day period, Mr. Alston won the District of Columbia "Lotto," which had an annuity value of more than one million dollars.[11]

Upon learning of her husband's Lotto prize, Mrs. Alston dismissed her petition for divorce.[12] Later, in April 1989, she filed an amended complaint for absolute divorce in which she charged Mr. Alston with adultery and sought permanent alimony, attorney's fees, and half the marital property, including the Lotto annuity.[13] Mr. Al-

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(c) *Award reduced to judgment.*—The court may reduce to a judgment any monetary award made under this section, to the extent that any part of the award is due and owing.

Id. § 8-205.

4. *Alston*, 331 Md. at 507, 629 A.2d at 75 (quoting MD. CODE ANN., FAM. LAW § 8-205(b)(8) (1991)).

5. *See supra* note 3.

6. *See Alston*, 331 Md. at 507, 629 A.2d at 76.

7. *Id.* at 500, 629 A.2d at 72.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 501, 629 A.2d at 72. Alston's Lotto winnings were to be paid as an annuity of approximately $44,000 per year over 20 years. Alston v. Alston, 85 Md. App. 176, 180, 582 A.2d 574, 576 (1990), *rev'd*, 331 Md. 496, 629 A.2d 70 (1993). By the time of trial, Alston had received two $44,000 payments, none of which Mrs. Alston received. *Id.*

12. *Alston*, 331 Md. at 501, 629 A.2d at 72.

13. *Alston*, 85 Md. App. at 181, 582 A.2d at 576. In her amended complaint, Mrs. Alston alleged that she and Mr. Alston had cohabitated for a short period in March 1988, thereby foregoing her previous claim for a no-fault divorce based on voluntary separation for more than a year. *Alston*, 331 Md. at 501 n.4, 629 A.2d at 72 n.4.

ston responded with a motion to dismiss, an answer, and a counter-complaint for absolute divorce on the grounds of Mrs. Alston's adultery, desertion, and cruelty.[14] Mr. Alston's motion to dismiss was denied.[15]

At trial, both parties testified to the other's adultery and lack of contribution, economic or noneconomic, to the family's well-being.[16] Each party pointed to factors in section 8-205(b) of the Family Law Article that supported his or her position as the more aggrieved spouse.[17] They agreed, however, that the Lotto annuity was marital property because it was acquired before the legal expiration of the marriage.[18] On November 15, 1989, the circuit court granted Mrs. Alston a judgment of absolute divorce based on Mr. Alston's admitted adultery.[19] The circuit court denied alimony,[20] but after considering in equal measure the ten factors set forth in section 8-205(b),[21] determined that Mrs. Alston should receive a marital property monetary award of one-half the yearly net distribution of the annuity.[22]

Mr. Alston appealed to the Court of Special Appeals.[23] Alston argued that because he acquired the Lotto annuity more than two years after his separation, the eighth factor, "how and when the specific marital property . . . was acquired, including the effort expended by each party in accumulating the marital property,"[24] should be given greater significance than the other factors.[25] Affirming the circuit

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14. *Id.* at 501, 629 A.2d at 73.

15. *Id.*

16. *See Alston*, 85 Md. App. at 181-83, 582 A.2d at 576-77 (including an extensive recapitulation of the trial testimony).

17. *Alston*, 331 Md. at 502, 629 A.2d at 73.

18. *Id.* Marital property is defined as "property, however titled, acquired by 1 or both parties during the marriage." MD. CODE ANN., FAM. LAW § 8-201(e)(1) (1991).

19. *Alston*, 331 Md. at 503, 629 A.2d at 73.

20. *Id.* At the time of filing her first complaint for divorce in late 1987, Mrs. Alston's net worth was approximately $26,000, which included pension rights worth approximately $22,000 and incidental assets in savings, furniture, and her car. *Id.* at 500-01, 629 A.2d at 72. Mr. Alston had a net worth of approximately $25,000, excluding the value of his car, which consisted of a pension valued at $17,000 and the value of his furniture. *Id.* at 501, 629 A.2d at 72. Neither of the Alstons owned any real estate in late 1987. *See id.* Mrs. Alston was earning $19,000 per year as a clerk with the Social Security Administration. *Id.* at 500, 629 A.2d at 72. Mr. Alston was earning $29,500 per year as a guard with the Department of Corrections in Washington, D.C. *Id.* at 501, 629 A.2d at 72.

21. *See supra* note 3.

22. *Alston*, 331 Md. at 503, 629 A.2d at 73.

23. *Id.* at 503-04, 629 A.2d at 73.

24. MD. CODE ANN., FAM. LAW § 8-205(b)(8) (1991).

25. *See* Alston v. Alston, 85 Md. App. 176, 188, 582 A.2d 574, 580 (1990), *rev'd*, 331 Md. 496, 629 A.2d 70 (1993).

court's equal application of the ten section 8-205(b) factors, the Court of Special Appeals stated:

> When the parties correctly conceded that the D.C. Lotto annuity was marital property, the court could not find it to be individual property and thus the method of acquisition, which would have controlled under a [section] 8-203(a) distribution, became merely one factor among ten statutory factors, with its weight to be determined by the court as the trier of fact.[26]

The Court of Appeals granted certiorari, but limited its review to the marital property issue.[27]

2. Legal Background.—Prior to the adoption of the Property Disposition in Divorce and Annulment Act,[28] Maryland courts disposed of property acquired during a marriage according to which party owned each particular asset.[29] Courts divided marital property only when joint ownership existed.[30] In many cases, this method of disposi-

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26. *Id.* at 188-89, 582 A.2d at 580 (citation omitted). Section 8-201(e)(2) of the Family Law Article states that "'Marital property' does not include property: (i) acquired before the marriage; (ii) acquired by inheritance or gift from a third party; (iii) excluded by valid agreement; or (iv) directly traceable to any of these sources." MD. CODE ANN., FAM. LAW § 8-201(e)(2) (1991).

27. *Alston*, 331 Md. at 504, 629 A.2d at 74.

28. Property Disposition in Divorce and Annulment Act, ch. 794, 1978 Md. Laws 2304 (codified at MD. CODE ANN., FAM. LAW §§ 8-201 to -205 (1991)).

29. *Alston*, 331 Md. at 505, 629 A.2d at 74.

30. *Id.* This method of division of marital assets is based on the inception of title theory and is derived from common-law doctrines. *See* Harper v. Harper, 294 Md. 54, 65, 448 A.2d 916, 921 (1982). The alternative method is the community property system, based on the source of funds theory. *Id.* at 70, 448 A.2d at 924; *see also* Scott Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71 (1979).

> The [inception of title] system rewards the spouse who is directly responsible for the acquisition of property and generally ignores the nonmonetary contributions of the other spouse toward that acquisition. By ignoring such contributions of the nonacquiring spouse during the marriage, any portion of the other spouse's property which the nonacquiring spouse receives on the dissolution of the marriage can be perceived as a mere gratuity, albeit forced perhaps, from the acquiring spouse or his estate. Any feeling that the nonacquiring spouse "earned" the property is absent.

Id. at 83 (citation omitted).

By contrast, "[t]he philosophy of the community system balances the contributions of the spouses during the marriage and attempts to balance the interests of the spouses in the property acquired during marriage." *Id.* at 85. In states that subscribe to a community property system, the manner in which marital assets are divided falls into two broad categories. *Id.* at 97. A few states, such as California and Louisiana, provide by statute that community property shall be equally divided. *Id.* Most other community property states have

tion was unfair because the noneconomic contributions of one spouse toward the acquisition of marital assets did not result in any legally cognizable property interest.[31] In response to such inequities, Governor Marvin Mandel appointed a commission in 1976 to study and recommend changes in the Family Law Article.[32] The Commission stated:

> The Commission does not believe that the people of Maryland today hold the view that a spouse whose activities within the marriage do not include the production of income has "never contributed anything toward the purchase of" property acquired by either or both spouses during the marriage. Its members believe that non-monetary contributions within the marriage are real and should be recognized in the event that the marriage is dissolved or annulled.
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> . . . Recognition of the "partnership" or unit theory of marriage, and the valuable contribution to it made by "non-

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statutes directing courts to use their discretion in dividing the community property. *Id.* This system treats the marriage as a single economic unit to which both spouses contribute individually but share alike as partners. *Id.* at 82. The source of funds theory recognizes that noneconomic, as well as economic, contributions are integral to the acquisition of marital property. *See id.* at 83. Consequently, assets acquired during the marriage and not purchased with resources that one spouse possessed before the marriage are said to have been acquired through use of a communal source of funds; they are considered community property. *Id.*

Suppose, for example, a spouse makes a down payment on a house from assets owned before the marriage (or simply owns the house with a mortgage), but makes subsequent payments with funds earned during the marriage. According to the inception of title theory, the spouse who made the down payment would own all property in the house outright regardless of the source of funds used to complete payment. A disposition of the same property according to the source of funds theory would grant the spouse making the down payment an amount directly proportional to the initial investment and the purchase price, but then divide the balance equally between the spouses. *See generally* LAWRENCE GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY §§ 8.01 to 8.07 (1983 & Supp. 1993).

31. *See* Gebhard v. Gebhard, 253 Md. 125, 130, 252 A.2d 171, 173-74 (1969) (holding that the trial court did not have the power to award a portion of certain property to a wife whose work in the home and at her husband's business "never contributed anything toward the purchase of the husband's property") (quoting Lopez v. Lopez, 206 Md. 509, 518, 112 A.2d 466, 470 (1955)). For a full discussion of the social and legal background of the Property Disposition in Divorce and Annulment Act, see Paula Peters, *Property Disposition upon Divorce in Maryland: An Analysis of the New Statute*, 8 U. BALT. L. REV. 377 (1979). *See also* JOHN F. FADER, II & RICHARD J. GILBERT, MARYLAND FAMILY LAW, ch. 17 (1990 & Supp. 1992).

32. Letter from Beverly Anne Groner, Chairperson, The Governor's Commission on Domestic Relations Law, to The Honorable Blair Lee III, Governor of the State of Maryland (Jan. 9, 1978), *facsimile reproduced in* GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS, REPORT ACCOMPANYING THE COMMISSION'S PROPOSED BILL ON THE DISPOSITION OF PROPERTY IN CONNECTION WITH A DIVORCE OR ANNULMENT, at ii-iii (1978) [hereinafter GOVERNOR'S COMMISSION].

> earning" and homemaking spouses, does *not* require that upon dissolution of the marriage all property be divided equally irrespective of need or title.[33]

Acting upon the Commission's recommendations, the General Assembly passed the Property Disposition in Divorce and Annulment Act in 1978.[34] The Preamble stated that "it is the policy of this State that when a marriage is dissolved the property interests of the spouses should be adjusted fairly and equitably, with careful consideration being given to both monetary and nonmonetary contributions made by the respective spouses."[35] The Act established a three-step process by which courts should grant monetary awards: They should (1) determine which property is marital property, (2) determine the value of the marital property, and (3) then grant a monetary award "as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded."[36]

Since the Act took effect on January 1, 1979, a steady progression of case law has refined and clarified the definition and disposition of marital property.[37] Although the issue of whether lottery winnings

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33. GOVERNOR'S COMMISSION, *supra* note 32, at 3.

34. Property Disposition in Divorce and Annulment Act, ch. 794, 1978 Md. Laws 2304 (codified at MD. CODE ANN., FAM. LAW §§ 8-201 to -205 (1991)).

35. *Id.*

36. *Id.* at 2308; *see also* Zandford v. Wiens, 314 Md. 102, 106, 549 A.2d 13, 15 (1988) (holding that "when a monetary award is at issue, the court is permitted to effectuate a realignment of assets via a three step process").

37. *See, e.g.*, Pope v. Pope, 322 Md. 277, 281-82, 587 A.2d 481, 483-84 (1991) (recognizing that the appropriate focus for determining whether property is nonmarital or marital for the purposes of granting a monetary award is the source of contributions made, rather than the time at which title is obtained); Herget v. Herget, 319 Md. 466, 473-74, 573 A.2d 798, 801-02 (1990) (holding that antenuptial agreements, relinquishing one spouse's claim to the property of the other, bar claims to a monetary award); Prahinski v. Prahinski, 321 Md. 227, 239, 582 A.2d 784, 790 (1990) (holding that goodwill of a sole law practice is a personal asset of the practitioner and not marital property); Niroo v. Niroo, 313 Md. 226, 237, 545 A.2d 35, 40-41 (1988) (holding that anticipated insurance renewal commissions accruing after dissolution of marriage are marital property); Queen v. Queen, 308 Md. 574, 586-87, 521 A.2d 320, 327 (1987) (ruling that the only portion of a disability award subject to equitable distribution is that which is acquired during the marriage); Unkle v. Unkle, 305 Md. 587, 596, 505 A.2d 849, 854 (1986) (holding that an inchoate personal injury claim that accrued during marriage was not marital property subject to equitable distribution upon divorce); Archer v. Archer, 303 Md. 347, 357, 493 A.2d 1074, 1079 (1985) (finding that a professional degree or license, and the prospective increase in earning power that it may confer, does not fall within the ambit of marital property); Grant v. Zich, 300 Md. 256, 268-70, 477 A.2d 1163, 1169-70 (1984) (holding that portions of property directly traceable to the contribution of a spouse's nonmarital property is not to be considered marital property and not subject to equitable distribution); Deering v. Deering, 292 Md. 115, 128, 437 A.2d 883, 890 (1981) (ruling that a spouse's pension right accumulated during the marriage constitutes marital property).

constitute marital property had not come before Maryland's appellate courts prior to *Alston*,[38] the designation of property acquired after separation but prior to a decree of absolute divorce seemed well settled. In *Williams v. Williams*,[39] the Court of Special Appeals held that "[p]roperty acquired by a party up to the date of the divorce, even though the parties are separated, is marital property."[40] In *Wilen v. Wilen*,[41] the court was even more emphatic. Reversing a trial court's determination that a marriage was factually dead and that property acquired after separation should not be considered marital property,[42] the court declared that "'marital property is to be determined and valued as of the date of divorce, not the date of separation.'"[43] The *Williams* and *Wilen* decisions comport with the absence of any language in sections 8-201 to 8-205 of the Family Law Article distinguishing separation from divorce.[44]

The issue of whether a court can give any one of the ten factors listed in section 8-205(b)[45] greater weight than the others in distributing marital property was also fairly well settled before *Alston*. Trial courts consistently were required to consider all ten factors.[46] Appel-

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38. Other states have generally found that lottery winnings acquired during the marriage are marital property. *See, e.g., In re* Marriage of Mahaffey, 564 N.E.2d 1300, 1305 (Ill. App. Ct. 1990) (holding that acquisition of the winning ticket during the marriage constituted marital property regardless of which spouse purchased the ticket); Giedinghagen v. Giedinghagen, 712 S.W.2d 711 (Mo. Ct. App. 1986) (holding that marital property encompasses any property, including lottery winnings, acquired up to the date of a decree of legal separation or dissolution); Smith v. Smith, 557 N.Y.S.2d 22 (N.Y. App. Div. 1990) (holding that lottery winnings are marital property and should be divided equally in a divorce action when both spouses made equal contributions to the marriage even though the winning ticket was acquired solely by husband's effort), *appeal denied*, 571 N.E.2d 83 (N.Y. 1991); Ullah v. Ullah, 555 N.Y.S.2d 834, 835 (N.Y. App. Div.) (holding that a lottery jackpot won during marriage is marital property and that equal division is appropriate since the jackpot was won as a result of fortuitous circumstances and not the result of either spouse's toil or labor), *appeal denied*, 559 N.E.2d 677 (N.Y. 1990). *But see* Dyer v. Dyer, 536 A.2d 453 (Pa. Super. Ct.) (holding that trial court had not abused its discretion in determining that a husband's lottery winnings obtained after a lengthy separation but before divorce were his sole property), *appeal denied*, 546 A.2d 58 (Pa. 1988).

39. 71 Md. App. 22, 523 A.2d 1025 (1987).

40. *Id.* at 34, 523 A.2d at 1031.

41. 61 Md. App. 337, 486 A.2d 775 (1985).

42. *Id.* at 345-46, 486 A.2d at 779-80.

43. *Id.* at 345, 486 A.2d at 779 (quoting Cotter v. Cotter, 58 Md. App. 529, 537, 473 A.2d 970, 974, *cert. denied*, 300 Md. 794, 481 A.2d 239 (1984)).

44. *See supra* note 3.

45. *See id.*

46. *See, e.g.*, Prahinski v. Prahinski, 321 Md. 227, 231, 582 A.2d 784, 786 (1990) (requiring that trial courts "apply the ten factors in § 8-205(b)"); Lookingbill v. Lookingbill, 301 Md. 283, 293, 483 A.2d 1, 6 (1984) (stating that "it is important that the chancellor consider *all* relevant factors beginning with those expressly set out in FL § 8-205") (emphasis added); Melrod v. Melrod, 83 Md. App. 180, 185, 574 A.2d 1, 3 (stating that "[t]he statute

late courts, for example, had held them in error for misinterpreting a factor[47] and for giving only lip service to a factor.[48] No Maryland court had ever ruled that courts could weigh one factor more heavily that another as a matter of law.[49] In light of this well-articulated precedent, the Court of Appeals reviewed *Alston* to determine whether property acquired after separation should be given special consideration under section 8-205(b).[50]

3. The Court's Reasoning.—Despite the precedent indicating that courts must give equal weight to all section 8-205(b) factors, the Court of Appeals held in *Alston* that the statutory language of section 8-205, as well as the legislative intent, required the trial court to give greater weight to section 8-205(b)(8), "how and when specific marital property . . . was acquired, including the effort expended by each party in accumulating the marital property," in order to distribute marital property acquired after separation equitably.[51] Thus, the *Alston* court found the trial court to have erred in awarding Mrs. Alston half of the Lotto annuity.[52]

The court acknowledged that Mr. Alston's Lotto annuity was properly defined as marital property,[53] but shifted its focus from the definitional question to the criteria used to determine the distribution of marital property.[54] The court observed that "[t]he decision whether to grant a monetary award is generally within the sound discretion of the trial court,"[55] but noted that section 8-205(a) is constructed in the

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lists ten factors that the court is required to consider in granting a monetary award"), *cert. denied*, 321 Md. 67, 580 A.2d 1077 (1990).

47. *See* Mount v. Mount, 59 Md. App. 538, 553, 476 A.2d 1175, 1183 (1984) ("[T]he Chancellor erred as a matter of law when he found that the 'facts and circumstances leading to the estrangement of the parties and the dissolution of the marriage' were not 'important' in considering either the award of alimony or the monetary award.").

48. *See* Ward v. Ward, 52 Md. App. 336, 343-44, 449 A.2d 443, 448 (1982) ("[I]t is clear from the record that the chancellor gave no more than lip service to the nine factors. We see nothing fair or equitable in . . . the court's findings.") (citation omitted).

49. Judge Bell's dissent vigorously argues this point. *Alston*, 331 Md. at 516-17, 629 A.2d at 80 (Bell, J., dissenting).

50. *See id.* at 504, 629 A.2d at 74.

51. *Id.* at 507, 629 A.2d at 75-76.

52. *Id.* at 509, 629 A.2d at 76-77.

53. *Id.* at 505, 629 A.2d at 74.

54. *Id.* at 506-07, 629 A.2d at 75.

55. *Id.* at 504, 629 A.2d at 74; *see also* Niroo v. Niroo, 313 Md. 226, 230-31, 545 A.2d 35, 37 (1988) ("[The statute] does allow the trial judge to make a monetary adjustment to more fairly and equitably allocate the various property interests."); Deering v. Deering, 292 Md. 115, 131, 437 A.2d 883, 892 (1981) ("[I]n selecting an appropriate method of allocating retirement benefits . . . , *should* the chancellor conclude it to be proper to do so, it is important that he carefully consider all relevant factors . . . .") (emphasis added).

permissive; it states "the court *may* . . . grant a monetary award."[56] The court maintained that a trial court, in exercising its discretion, must act "in accordance with correct legal standards."[57] It also pointed to the General Assembly's intention that courts "make equitable, as opposed to presumptively equal, property divisions,"[58] and indicated that this emphasis was primarily intended to aid the trial court in reflecting the nonmonetary contributions made toward the acquisition of marital property.[59] The court concluded that "[w]hile no hard and fast rule can be laid down, and while each case must depend upon its own circumstances to insure that equity be accomplished, generally in a case such as this the eighth factor should be given greater weight than the others."[60] Accordingly, the court held that, when one party acquires a specific asset wholly through his or her own effort without any indirect or direct help from the other and the marital family effectively has ceased to exist, an equal division of the asset is inequitable and contrary to the history and intent of the statute.[61]

The *Alston* court acknowledged that, when weighed in light of the legislative purpose of achieving an equitable result, the relevant factors used in making a marital property monetary award may lead the trial judge to make an equal distribution.[62] The court also recognized, however, that each divorce case is unique and must be evaluated individually,[63] and thus concluded that "[i]n light of the peculiar circumstances of this case . . . the trial judge erred in awarding half of the Lotto annuity to Mrs. Alston."[64] The court further declared that

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56. *Alston*, 331 Md. at 504, 629 A.2d at 74 (quoting MD. CODE ANN., FAM. LAW § 8-205(a) (1991)) (emphasis added by court).

57. *Id.; see* Bohnert v. State, 312 Md. 266, 275, 539 A.2d 657, 661 (1988) ("It is well settled in this State, however, that the trial court's determination is reviewable on appeal, . . . and may be reversed if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion.") (citing Radman v. Harold, 279 Md. 167, 173, 367 A.2d 472, 476 (1977)). In *Alston*, the court applied this "error of law" standard in reversing the trail court. *See Alston*, 331 Md. at 509, 629 A.2d at 77.

58. *Alston*, 331 Md. at 506, 629 A.2d at 75. The court noted that in drafting the Property Disposition in Divorce and Annulment Act, the General Assembly deleted language that read: "'A monetary award shall be presumptively such as is necessary to divide the value of the marital property equally between the parties. The court may adjust the division of the value of the marital property on a basis other than equal after considering' several factors." *Id.* (quoting Property Disposition in Divorce and Annulment Act, ch. 794, 1978 Md. Laws 2304, 2308 (codified at MD. CODE ANN., FAM. LAW §§ 8-201 to -205 (1991))).

59. *See supra* notes 31-35 and accompanying text.

60. *Alston*, 331 Md. at 507, 629 A.2d at 75.

61. *Id.*, 629 A.2d at 76.

62. *Id.* at 509, 629 A.2d at 76.

63. *Id.*, 629 A.2d at 76-77.

64. *Id.*, 629 A.2d at 77.

the record revealed "no evidence which would justify awarding any portion of the annuity to Mrs. Alston."[65] In view of its denial of a monetary award, the court remanded the case for reconsideration in the matter of alimony.[66]

4. Analysis.—In *Alston*, the Court of Appeals departed from precedent in the area of marital property distribution when it acknowledged that the Lotto annuity was marital property, but held it subject to special consideration because of the "peculiar circumstances" of its acquisition after separation.[67] In so ruling, the court overruled the Court of Special Appeals's *Williams* and *Wilen* decisions, which had refused to accord post-separation property any special status upon disposition in a divorce settlement.[68] Before *Alston*, trial courts were required as a matter of law to give serious consideration to each of the ten factors enumerated in section 8-205(b) of the Family Law Article.[69] Now, by directing that more weight be given in certain circumstances to how and when the marital property was acquired, the court has added an extra layer of consideration in cases involving the disposition of some marital property acquired by a spouse after separation.[70] Although the *Alston* decision will, to some degree, restrict the discretionary authority of trial courts,[71] courts will continue to exercise a considerable amount of discretion in deciding what constitutes an "equitable" division of the property in light of this special consideration and the many circumstances unique to each case.[72]

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65. *Id.*

66. *Id.* For a discussion of the relationship between alimony and monetary awards, see McAlear v. McAlear, 298 Md. 320, 347, 469 A.2d 1256, 1270 (1984) ("We recognize . . . that there is an interrelationship between a monetary award . . . and an award of alimony. . . . [I]n determining the amount of a monetary award, equity courts must consider any award of alimony, while in determining the amount of alimony, equity courts must consider any monetary award.").

67. *Alston*, 331 Md. at 509, 629 A.2d at 77.

68. *See supra* notes 39-43 and accompanying text.

69. *See* Comptroller v. Fairchild Indus., 303 Md. 280, 285-86, 493 A.2d 341, 343-44 (1985) ("[T]he word 'and' [in the list of factors in § 2-805(b)] should be interpreted according to its plain and ordinary meaning and that it is not interchangeable with the word 'or.'"). *See generally* 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 21.14, at 127-28 (4th ed. 1985) (defining and distinguishing between conjunctive and disjunctive terms).

70. *Alston*, 331 Md. at 508, 629 A.2d at 76. The extra layer of review is in having to consider "different factors, depending on the timing of acquisition." *Id.* at 519, 629 A.2d at 81 (Bell, J., dissenting).

71. *Id.* at 507, 629 A.2d at 75.

72. *Id.* In his dissent, Judge Bell pointed to the court's continued reliance on the trial judge's discretion as reason enough to leave the weighing of all factors, including how and when the post-separation property was acquired, in the hands of the chancellor. *See id.* at 518, 629 A.2d at 81 (Bell, J., dissenting). Judge Bell argued that, had the General Assembly

In *Alston*, the court correctly concluded that the legislative intent of sections 8-201 through 8-205, focusing on the value of a spouse's noneconomic contributions in the acquisition of marital assets, would preclude the equal division of a fortuitous windfall acquired by one of the spouses after separation and without the facilitation of the other.[73] The Governor's Commission, as well as the General Assembly, sought to protect nonincome earning spouses from the inequities of property disposition based strictly on an individual's economic contribution or ownership of title.[74] The statute does not discuss the status of spouses' contributions to the marriage and marital property after separation but before a decree of divorce, but it logically follows that after a separation in which the marriage has functionally ceased to exist, the wholly independent acquisition of property by one spouse should not be subject to equal division between the divorcing spouses.[75] Prior to *Alston*, however, Maryland courts generally divided such property on the theory that the source of funds used to purchase the asset was derived from a statutorily defined common source.[76] To resolve this inequity, the Court of Appeals could have defined as nonmarital property an asset acquired after separation. Instead, the court focused on the original intent of the statute[77] and avoided addressing the issue of whether the ticket should have been defined as marital property.[78] Under the broad rubric of equity, the court ruled that in the distribution of marital property acquired after separation, "greater weight" must be given to how and when the marital property was acquired.[79] Consequently, the interest of a spouse in property acquired by the other spouse after separation has been diminished.

While the *Alston* decision resolved certain inequities in the distribution of marital property, it also created some difficulties. The decision does not make entirely clear, for example, how courts should define "equitable" with regard to distributing marital property acquired after separation. In his dissent, Judge Bell pursued this point to its logical extreme; he noted that, had the Lotto ticket been ac-

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intended to distinguish preseparation property from postseparation property or to prioritize the relative weights of the factors, it would have drafted the legislation accordingly. *Id.* at 519, 629 A.2d at 82 (Bell, J., dissenting).

73. *See id.* at 507, 629 A.2d at 76.

74. *See supra* notes 32-36 and accompanying text. As conceived and drafted, the 1978 Property Disposition in Divorce and Annulment Act viewed marriage as a partnership of variously contributing spouses. *See supra* notes 34-36 and accompanying text.

75. *Alston*, 331 Md. at 507, 629 A.2d at 76.

76. *See supra* notes 28-31 and accompanying text.

77. *See supra* notes 32-36 and accompanying text.

78. *See Alston*, 331 Md. at 508, 629 A.2d at 76.

79. *Id.* at 507, 629 A.2d at 75.

quired "pre-separation, even if by only an hour, the chancellor's decision to weigh all of the relevant factors would not be a problem for the majority. If, however, the property were acquired after separation, even if by only an hour, a different result would obtain . . . ."[80] In future cases, courts will be forced to draw discretionary lines when determining the circumstances under which, and the degree to which, greater weight should be accorded to how and when the property was acquired.

The *Alston* court did not, however, leave trial judges entirely without guidance. In cases "[w]here one party, wholly through his or her own efforts, and without any direct or indirect contribution by the other, acquires a specific item of marital property after the parties have separated and after the marital family has, as a practical matter, ceased to exist," it expressly held that an equal division of the property would be contrary to the statute.[81] On the other hand, it warned that "no hard and fast rule can be laid down"[82] and that "[e]ach divorce situation is different, and must be evaluated individually."[83] A review of the particular circumstances in *Alston* may make the court's emphatic denial of *any* portion of the annuity to Mrs. Alston[84] seem unduly harsh. But, by remanding the case for redetermination with respect to alimony, the court may have given back with one hand what it took away with the other.[85] That is, by remanding the case, the court stressed the interrelationship between monetary awards and alimony and indicated that courts should take into account the existence or nonexistence of any monetary award in determining alimony.[86]

5. Conclusion.—The *Alston* decision broke new ground in the law regarding the division of marital property upon divorce. By mandating special consideration of how and when marital property was acquired when it was acquired after separation, the Court of Appeals decreased the potential for inequitable distributions of such assets. Also significantly, the court underscored the importance of considering the amount of any monetary award when determining alimony in a case.

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80. *Id.* at 516, 629 A.2d at 80 (Bell, J., dissenting).
81. *Id.* at 507, 629 A.2d at 76.
82. *Id.*, 620 A.2d at 75.
83. *Id.* at 509, 629 A.2d at 76-77.
84. *Id.*, 629 A.2d at 77.
85. *See supra* note 66 and accompanying text.
86. *See Alston*, 331 Md. at 509, 629 A.2d at 77.

C. *Paternity Determinations in Custody Disputes: Blood Testing and the Child's Best Interests*

In *Monroe v. Monroe*,[1] the Court of Appeals concluded that during a custody dispute, blood tests used by a biological mother to disestablish an acknowledged father's paternity should not be ordered without first assessing the impact on the child's welfare.[2] In reaching this conclusion, the *Monroe* court evaded the Court of Special Appeals' equitable estoppel theory[3] and instead focused on broader policy notions of the child's best interests. Because the trial court had admitted the blood test results into evidence, the Court of Appeals ultimately remanded the custody issue as one involving a biological parent and a third party.[4] Before doing so, however, it requested that the trial court more fully consider the "universe of circumstances" that potentially could rebut the presumption that a child's best interest lies with the biological parent.[5]

1. The Case.—In the spring of 1985, Patricia Thomas informed her then boyfriend, Donald Monroe, that she was pregnant with his child.[6] Due to his low sperm count, Mr. Monroe expressed doubts.[7] To persuade him of his paternity, Ms. Thomas underwent a voice stress analysis test that strongly indicated her belief that he was the father of the expected baby.[8] Seemingly convinced, Mr. Monroe then moved in with Ms. Thomas and later was present at the birth of the child, Beth.[9] In addition, his name appears on Beth's birth certificate as her father.[10]

The couple lived together with Beth for about two and one-half years before they married in May 1988.[11] A few months later, during an argument, Mrs. Monroe admitted that her new husband was probably not Beth's biological father.[12] This remark strained the marriage and a brief separation ensued, during which Mrs. Monroe filed for

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1. 329 Md. 758, 621 A.2d 898 (1993).
2. *Id.* at 773, 621 A.2d at 905.
3. Monroe v. Monroe, 88 Md. App. 132, 138-40, 594 A.2d 577, 580-81 (1991); *vacated*, 329 Md. 758, 621 A.2d 898 (1993).
4. *Monroe*, 329 Md. at 773, 621 A.2d at 905.
5. *Id.* at 775, 621 A.2d at 906.
6. *Monroe*, 88 Md. App. at 135, 594 A.2d at 578-79.
7. *Id.*, 594 A.2d at 579.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Monroe*, 329 Md. at 761, 621 A.2d at 899.

divorce.[13] Mr. Monroe responded with a Motion for an Order Requiring Blood Tests, accompanied by an affidavit indicating his doubt about his paternity.[14] The couple, however, reconciled before any tests were ordered.[15]

In July 1989, the couple separated again by mutual consent.[16] At this time, they entered into a Voluntary Separation and Property Settlement Agreement in which they agreed to joint custody of Beth.[17] The agreement included a clause providing that neither party would move from the state with the child without the express consent of the other.[18] In addition, the parties signed two separate consent orders.[19] The first confirmed the custody arrangement, including provisions for child support and private education costs to be paid by Mr. Monroe.[20] The second required psychiatric evaluations of the parties and Beth to inform future custody and visitation recommendations.[21]

In June 1990, Mr. Monroe discovered that his wife was planning to leave Maryland with Beth.[22] He immediately filed a motion to obtain temporary and exclusive custody of Beth, which the Circuit Court for Baltimore County granted.[23] Prior to a full evidentiary hearing, Mrs. Monroe filed a Motion to Order Blood Tests to Establish Paternity, officially claiming for the first time that her husband was not Beth's father.[24] The court granted the motion and later denied Mr. Monroe's Motion for Reconsideration.[25] At the evidentiary hearing, the court admitted into evidence the blood tests, which proved that Mr. Monroe was not Beth's biological father.[26] Despite the blood test results, the Master in the Circuit Court for Baltimore County found that "exceptional circumstances" existed and allowed Mr. Monroe to maintain custody of Beth.[27] Both parties entered exceptions to the

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13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 761-62, 621 A.2d at 899.
21. *Id.* at 762, 621 A.2d at 899.
22. Monroe v. Monroe, 88 Md. App. 132, 136, 594 A.2d 577, 579 (1991), *vacated,* 329 Md. 758, 621 A.2d 898 (1993).
23. *Id.*
24. *Id.* at 137, 594 A.2d at 580.
25. *Id.*
26. *Id.*
27. *Id.* The exceptional circumstances inquiry is part of the standard of review set forth in Ross v. Hoffman, 280 Md. 172, 372 A.2d 582 (1977), for custody suits involving biological parents versus third parties. *See infra* notes 67-70 and accompanying text.

Master's determination, Mrs. Monroe to the custody arrangement and Mr. Monroe to the admission of the blood test results into evidence.[28] Judge Levitz denied Mr. Monroe's exceptions and further held that "as a matter of law" exceptional circumstances did not exist to rebut the presumption that custody should be with the biological parent.[29] Accordingly, he transferred custody of Beth to Mrs. Monroe.[30]

On review, the Court of Special Appeals reversed the decision of the trial court, holding that it erred in ordering the blood tests without inquiry into the child's best interests.[31] In reaching its conclusion, the court applied a theory of equitable estoppel to the facts and concluded that Mrs. Monroe was estopped by her prior conduct[32] "from using the results of the blood test to bastardize her child."[33] The Court of Appeals granted certiorari to consider the applicability of the child's best interest standard to the ordering and admitting of blood test results.

2. Legal Background.—

a. Ordering of Blood Tests.—Traditionally, the issue of blood testing was confined to paternity proceedings.[34] The evolving policy goals behind the evidentiary use of blood tests in this context, however, foreshadowed its introduction into the custody realm. Initially acknowledged as a viable evidentiary tool in 1941 in criminal bastardy proceedings,[35] blood testing forwarded the State's interest in punishing fornication and alleviating the fiscal burden of illegitimate children.[36] In 1963, the legislature, in a major revision to the paternity

28. *Monroe*, 329 Md. at 762, 621 A.2d at 900.

29. *Id.* at 762-63, 621 A.2d at 900.

30. *Id.* at 762, 621 A.2d at 900.

31. *Monroe*, 88 Md. App. at 140, 594 A.2d at 581.

32. The court noted that "Mrs. Monroe voluntarily represented to Mr. Monroe that he was the father of her child and Mr. Monroe reasonably believed he was the child's father." *Id.*, 594 A.2d at 582.

33. *Id.* at 138, 594 A.2d at 580. The Court of Special Appeals explained that the doctrine of equitable estoppel requires that "the party claiming the benefit of the estoppel must have been misled to his injury and changed his position for the worse, having believed and relied on the representations of the party to be estopped." *Id.* at 139, 594 A.2d at 580-81.

34. *See* Shanks v. State, 185 Md. 437, 45 A.2d 85 (1945) (justifying the admission of blood test results in a criminal rape case based on their extensive use in bastardy proceedings).

35. MD. CODE ANN. art. 16, § 66G (1941) (repealed 1984) recognized blood testing for use in criminal bastardy proceedings.

36. Eagan v. Ayd, 313 Md. 265, 269, 545 A.2d 55, 56 (1988). At that time, bastardy determinations were criminal proceedings. *Id.* Blood testing therefore served as a defense and evasion of punishment if it established nonpaternity. *See id.* at 270, 545 A.2d at 57.

statute, decriminalized the proceedings[37] and "removed some of the legal impediments to establishing paternity."[38] Significantly, an "apparent pro-male tilt" present in the original statute was retained to promote the putative father's interest in using blood tests to assert nonpaternity.[39] In the 1970s, the evolution continued as mothers began to rely on blood testing to prove paternity for child support purposes.[40]

Only recently have the policy goals behind blood testing in the paternity context shifted their focus from the interests of the parents to those of the child. With the development of the more reliable Human Leucocyte Antigen (HLA) genetic blood testing,[41] which was recognized by the General Assembly in 1982,[42] a "more contemporary Maryland perspective" on the use of blood tests emerged.[43] Specifically, Maryland courts and the legislature acknowledged the need "to protect illegitimate children through court-ordered support based upon sophisticated and reliable genetic testing."[44]

In pursuit of this goal, the legislature in 1984 revised the Code's blood testing provision at section 5-1029 of the Family Law Article to establish a mandatory acceptance of blood test results in paternity proceedings.[45] This most recent amendment, although intended to further the "*general* welfare" of the illegitimate child,[46] is more narrowly focused on the child's economic interest in the enforcement of sup-

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37. *Id.* at 271, 545 A.2d at 57.

38. *Id.* at 273, 545 A.2d at 58.

39. *See id.* at 272, 545 A.2d at 58 (noting "the apparent pro-male tilt" underlying the goals of the 1963 legislation decriminalizing paternity proceedings).

40. *See id.* at 275, 545 A.2d at 59 (discussing "the 1976 enlargement of effective procedures for child support recovery" and the resulting use of blood testing as a viable evidentiary weapon for the mother).

41. HLA blood testing produces a 92% mean probability of exclusion of nonbiological fathers. Haines v. Shanholtz, 57 Md. App. 92 , 95, 468 A.2d 1365, 1366 (1984).

42. *Id.* ("The Maryland Legislature, by enacting Chapter 784 of the 1982 Laws of Maryland, recognized the advances made in the science of genetic testing and authorized a new proceeding in which blood test results could be used in paternity cases, in which exclusion is not established, if the results are sufficiently extensive to exclude 97.3 percent of putative fathers who are not biological fathers and where the statistical probability of the alleged father's paternity is at least 97.3 percent.").

43. *Eagan,* 313 Md. at 275, 545 A.2d at 59.

44. *Id.* The purpose of the current paternity statute is "to promote the general welfare and best interests of children born out of wedlock". MD. CODE ANN., FAM. LAW § 5-1002 (b)(1) (1984).

45. The statute states that, if qualified, "laboratory blood tests *shall* be received in evidence." MD. CODE ANN., FAM. LAW § 5-1029(e) (1984) (emphasis added).

46. *Id.* § 5-1002(b)(1).

port payments.[47] Although judicial emphasis increasingly is placed on the psychological well-being of the child,[48] the application of section 5-1029 in the context of visitation or custody battles may work against the goal of protecting the overall welfare of the illegitimate child. Specifically, admitting blood tests into evidence in custody proceedings may harm a child's interests in established relationships. Moreover, the mandatory nature of section 5-1029 imposes a straightjacket on trial judges'[49] discretion to consider the broader policy issues surrounding a child's welfare.

The Court of Appeals first struggled with the best interests of the child dilemma in *Turner v. Whisted*.[50] In *Turner*, a putative father, wishing to assert visitation rights, attempted to use blood test results to rebut the presumption of another man's acknowledged paternity.[51] The trial court and the Court of Special Appeals both held that his request for blood tests pursuant to section 5-1029 should be denied because such results, if they proved his paternity, would directly undermine the traditional marital presumption that "[a] child born or conceived during a marriage is . . . the legitimate child of both spouses."[52] The Court of Appeals affirmed.[53] In doing so, however, the court expanded the narrow holding of the lower courts, explaining that a paternity determination is not confined to resolution under

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47. The legislative goals outlined in § 5-1002(b)(1) targeted the need to secure for illegitimate children "the same rights to support, care, and education as children born in wedlock." *Id.* The case law has likewise narrowly construed the purpose of this provision as imposing the basic obligations and responsibilities of parenthood on those who have children out of wedlock and enforcing support payment. *See* Williams v. Williams, 18 Md. App. 353, 356, 306 A.2d 564, 565-66 (1973) (holding that the paternity provisions were "patently designed to provide a special procedure for fixing the amount that the father of an illegitimate child is required to contribute to its support and to prescribe a remedy for the enforcement of any support order").

48. This concern was initiated primarily by the 1973 groundbreaking publication of *Beyond the Best Interests of the Child* by Joseph Goldstein, Anna Freud, and Albert Solnit. The authors of this study proposed that courts should focus on the child's established "psychological parent" or the "one who, on a continuing, day to day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, *as well as the child's physical needs.*" JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD 98 (1973) (emphasis added).

49. Before the 1984 amendment, § 5-1029 allowed trial judges discretion in admitting blood test results. *See* Haines v. Shanholtz, 57 Md. App. 92, 97-98, 486 A.2d 1365, 1367 (1984) (holding that in light of the new mandatory nature of § 5-1029, the trial judge erred in refusing to admit blood test results).

50. 327 Md. 106, 607 A.2d 935 (1992).

51. *Id.* at 109-10, 607 A.2d at 937.

52. *Id.* at 110, 607 A.2d at 937 (quoting MD. CODE ANN., EST. & TRUSTS § 1-206 (a) (1991)).

53. *Turner*, 327 Md. at 117, 607 A.2d at 941.

Maryland's paternity statute.[54] Alternatively, the putative father's request could have been viewed under section 1-208 of the Estates and Trusts Article, which applies to illegitimate children.[55] This section was designed primarily for intestate purposes and focuses on the strength of relational ties between the putative father and the child.[56] Moreover, the court added that resort to section 2-108 allowed for a more equitable inquiry into the nature of the relationship between the putative father and the child.[57] It concluded that section 1-208 presents a "more satisfactory" and "less traumatic" means of establishing paternity in visitation rights cases, as opposed to child support cases.[58]

Under section 1-208, the *Turner* court concluded that an order for blood tests is "best analyzed as a request for a physical examination under Maryland Rule 2-423."[59] Included in rule 2-423 is a "good

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54. Maryland's paternity statute is contained at MD. CODE ANN., FAM. LAW §§ 5-1001 to -1048 (1991).

55. *Turner*, 327 Md. at 113, 607 A.2d at 938. In support of its assertion, the court cited the reciprocal reference in § 5-1005(a), which states that "[a]n equity court may determine the legitimacy of a child pursuant to § 1-208 of the Estates and Trusts Article." *Id.* at 112, 607 A.2d at 938.

56. Section 1-208 provides in part:

> (b) Child of his father—A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father
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> (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings; or
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> (2) Has acknowledged himself, in writing, to be the father; or
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> (3) *Has openly and notoriously recognized the child to be his child*; or
>
> (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

MD. CODE ANN., EST. & TRUSTS § 1-208(b) (1974) (emphasis added).

57. *Turner*, 327 Md. at 112-13, 607 A.2d at 938.

58. *Id.* at 113, 607 A.2d at 938 (quoting Thomas v. Solis, 263 Md. 536, 544, 283 A.2d 777, 781 (1971)). In *Thomas*, the court held that a putative father's attempt to prove his paternity to protect his visitation rights was better handled under § 1-208 than the paternity statute, "which deals with the narrow question involving bastardy proceedings to determine the putative father for the purpose of fixing responsibility for support." *Thomas*, 263 Md. at 542, 283 A.2d at 780. *See also* Dawson v. Eversberg, 257 Md. 308, 313-14, 262 A.2d 729, 732 (1970) (dissuading a putative father from seeking to legitimate his children through adoption under the predecessor of §§ 5-1001 to -1048 and instead referring to § 1-208 as "the less traumatic approach to the problem").

59. *Turner*, 327 Md. at 13, 607 A.2d at 939. Maryland Rule of Civil Procedure 2-423 provides in pertinent part:

> When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a physician or to produce for examination the person in custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties.

cause" requirement, which establishes that the trial judge has the *discretion* to grant or deny an order for blood tests for "good cause shown."[60] The *Turner* court played on the notion of "good cause" to construct a balancing test more appropriately tailored to this type of paternity dispute, weighing "the integrity of the familial relationships already formed"[61] versus the rights of the biological father.[62] Most significantly, the *Turner* court stated that "the determination of good cause allows the court discretion to consider the best interests of the child."[63]

b. The Parental Rights Doctrine and the Child's Best Interest Standard.—By factoring in the best interests of the child, the *Turner* decision represented a more sensitive appraisal of the impact admission of blood test results has on children in paternity cases. In the custody dispute context, however, Maryland courts have long conducted inquiries into the child's best interests.[64] But, as in many jurisdictions, the best interest inquiry has been hindered by the imposition of judicial and legislative presumptions.[65] Perhaps the most deeply rooted notion in Maryland family law is the parental rights doctrine: the "*prima facie* presumption that a child's welfare will be best served in the care and custody of its [natural] parents rather than a third party."[66] The standard was clearly enunciated in *Ross v. Hoffman*:[67]

MD. R. CIV. P. 2-423 (1994).

60. MD. R. CIV. P. 2-423 (1994).

61. *Turner*, 327 Md. at 117, 621 A.2d at 940 (referring to the concerns expressed by Justice Scalia in the recent Supreme Court custody decision, Michael H. v. Gerald D., 491 U.S. 110 (1989), *reh'g denied*, 492 U.S. 937 (1991)).

62. *Id.* at 116-17, 621 A.2d at 940 (quoting *Michael H.*, 491 U.S. at 142-43 (Brennan, J., dissenting)). The court further noted the need for "substantial protection under the Due Process Clause" for unwed fathers seeking to assert parental rights. *Id.*

63. *Id.* at 116, 621 A.2d at 940 (citing *In re* Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989) (holding, for the first time in a paternity suit, that an evidentiary hearing on the child's best interests was required before blood tests could be ordered)).

64. *See, e.g.*, Piotrowski v. State *ex rel.* Kowalck, 179 Md. 377, 382, 18 A.2d 199, 201 (1941) (concluding that the common law paternal preference doctrine "must yield to the paramount consideration of what will be the best interest of the children"); Dietrich v. Anderson, 185 Md. 103, 116, 43 A.2d 186, 191 (1945) (asserting that the best interest of the child is "of transcendent importance"); *see also* John W. Ester, *Maryland Custody Law—Fully Committed to the Child's Best Interests?*, 41 MD. L. REV. 225 (1982) (discussing Maryland courts' historical consideration of the best interests of the child).

65. *See generally* Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705 (1986) (placing the custody law of each state along a continuum of presumptions favoring one party over the other); Ester, *supra* note 64 (arguing that various historical presumptions should be abolished because they infringe on full exploration of the child's best interests).

66. Newkirk v. Newkirk, 73 Md. App. 588, 593, 535 A.2d 947, 949 (1988); *see also* Ross v. Pick, 199 Md. 341, 352, 86 A.2d 463, 469 (1952) ("[T]he court gives more weight to the law

> [I]n parent-third party disputes over custody, it is only upon a determination by the equity court that the parent is unfit or that there are exceptional circumstances which make custody in the parent detrimental to the best interest of the child, that the court need inquire into the best interest of the child in order to make a proper custodial disposition.[68]

Relying on the standard set forth in *Ross*, a court must initially focus on the disputing parties rather than on the interests of the child.[69] While there is some discretion afforded in the notion of "exceptional circumstances" to consider the child's best interests,[70] the court's evidentiary perspective is skewed in favor of the biological parent's right to custody. Therefore, under the *Ross* standard, the third party incurs a substantial burden in rebutting the presumption.

3. The Court's Reasoning.—In *Monroe*, the Court of Appeals primarily focused on the issue of whether an acknowledged father in a custody dispute should be ordered to submit to a blood test without first considering the best interests of the child.[71] Because the blood tests in this case had been ordered and admitted into evidence below, the court also was forced to address the secondary issue of whether blood-test results, which prove that the acknowledged father is not the biological father, should be dispositive in the outcome of a custody dispute under the *Ross* standard.[72]

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of nature, which recognizes the force of parental affection."); Montgomery County Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 416, 381 A.2d 1154, 1161 (1977) ("While there is a school of thought that shelves sentiment and ignores the old shibboleth that 'bluid is thicker than water,' Maryland has remained loyal to the common law presumption that the right of either natural, intermarried parent is generally superior to that of a third party.") (citation omitted).

67. 280 Md. 172, 372 A.2d 582 (1977).

68. *Id.* at 179, 372 A.2d at 587.

69. *See id.* (stating that the analysis focuses on the biological parent) .

70. For example, the "exceptional circumstances" factors specified in *Ross* included, among others, (1) "the possible emotional effect on the child of a change in custody," (2) "the nature and strength of the ties between the child and the third party custodian," and (3) "the stability and certainty as to the child's future in the custody of the parent." *Id.* at 191, 372 A.2d at 593. The inclusion of these child-centered inquiries in the "exceptional circumstances" rebuttal has led one commentator to call Maryland's parental rights doctrine a "disappearing presumption" because the definition is "virtually indistinguishable from an analysis of the child's best interest." Haynie, *supra* note 65, at 719 n.48.

71. *Monroe*, 329 Md. at 760, 621 A.2d at 899.

72. *Id.*; *see supra* notes 67-70 and accompanying text (discussing the *Ross* standard).

In addressing the primary issue, the Court of Appeals relied heavily on its rationale in the recent *Turner* decision.[73] The court essentially modified the *Turner* "good cause" balancing test as applied to blood tests to fit the context of the custody proceeding. Moreover, it looked to section 5-1001 of the Family Law Article and section 1-208 of the Estates and Trusts Article to inform its determination.[74] The court prefaced its "good cause" analysis by noting that the use of blood tests by Mrs. Monroe in this factual scenario directly undermined "the policies and purposes underlying [the] statutes"—specifically, the legislature's goal of furthering the child's welfare through legitimation.[75] In contrast, the court posited that Mr. Monroe, in "acknowledg[ing] his paternity of Beth in three of the four ways enumerated in [section] 1-208,"[76] acted to further the purpose of the legitimation statutes.[77]

Given that Mrs. Monroe's request ran counter to legislative goals in the paternity context, the court critically evaluated her "motive" in using blood test results during a child custody dispute to disestablish an acknowledged father.[78] Citing *Turner*, the court concluded that, at a minimum, Mrs. Monroe should have been required to show "good cause"—specifically, how ordering blood tests worked in the best interests of the child.[79] Consequently, the Court of Appeals concluded

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73. *Monroe*, 329 Md. at 772, 621 A.2d at 905 (claiming that the "factors identified in *Turner* apply with equal force" to the best interest/good cause inquiry developed in *Monroe*).

74. *Id.* at 767, 621 A.2d at 902. The court acknowledged that although "establishing paternity is not a necessary factor to be considered when addressing the issue of custody[, t]he policies and purposes underlying those statutes are . . . relevant to the determination whether good cause . . . has been shown." *Id.*

75. *Id.* The court expressed concern over Mrs. Monroe's wish to disestablish her husband's acknowledged paternity, despite concerns about the effect on Beth, without "the establishment, concomitantly or otherwise, of paternity in someone else." *Id.* at 766, 621 A.2d at 902. This sentiment dictated the holding of the Court of Special Appeals that Mrs. Monroe was "equitably estopped from using the results of a blood test to bastardize her child." Monroe v. Monroe, 88 Md. App. 132, 138, 594 A.2d 577, 580 (1991), *vacated*, 329 Md. 758, 621 A.2d 898 (1993).

76. *Monroe*, 329 Md. at 768-69, 621 A.2d at 902-03; *see supra* note 56.

77. *Monroe*, 329 Md. at 768-69, 621 A.2d at 902-03.

78. *See id.* at 770-71, 621 A.2d at 904 (questioning Mrs. Monroe's decision to disprove Mr. Monroe's paternity in light of her previous affirmations of his paternity).

79. *Id.* at 767, 621 A.2d at 902. The *Monroe* court also relied on case law from other jurisdictions for support in concluding that the best interests of the child must be assessed before admitting blood tests. *Id.* at 771, 621 A.2d at 904; *see, e.g.*, Ban v. Quigley, 812 P.2d 1014, 1017 (Ariz. App. 1990); *In re* Marriage of Ross, 783 P.2d 331, 336 (Kan. 1989); Boyles v. Boyles, 466 N.Y.S.2d 762, 763 (1983).

that the trial court should have required this threshold determination.[80]

While not remanding this issue for application to the *Monroe* facts,[81] the Court of Appeals, drawing from *Turner*, outlined the appropriate "weighing process" for assessing the child's best interests as a "good cause" prerequisite.[82] Although the court conceded that Mr. Monroe was not, de facto, a presumptive father, it treated his interest "in protecting the relationship he [had] formed, and maintained, with the child" as having weight comparable to Mrs. Monroe's interest in gaining sole custody.[83] The child's "physical, mental, and emotional needs," preferably advocated by a representative, should have then, according to the court, informed a balancing of their interests.[84] More significantly, the court concluded that the trial court must ultimately view the impact of blood test results on these respective interests from the "child's perspective."[85]

Because the results of Mr. Monroe's blood tests were known, the court remanded the case as a biological parent versus third party custody dispute. With no other options, the *Monroe* court felt compelled to clarify the *Ross* court's "exceptional circumstances" rebuttal to the presumption favoring biological parents.[86] In particular, the Court of Appeals chastised the trial court for narrowly defining exceptional circumstances as involving a long separation between the child and the biological parent.[87] The court then reiterated that the best interest standard should control, as it is "the critical question" in assessing exceptional circumstances.[88] The court, therefore, found that the trial court erred in ignoring the possibility that a "bonding or psychological dependence" upon a third party, one without a biological connection, could have developed despite the presence of an on-going

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80. *Monroe*, 329 Md. at 773, 621 A.2d at 905.

81. *Id.* at 773, 621 A.2d at 905 (explaining that since "the cat is now out of the bag and cannot now be stuffed back in," there is no point in remanding for further consideration of this issue).

82. *Id.* at 772-73, 621 A.2d at 905.

83. *Id.* at 772, 621 A.2d at 905.

84. *Id.* The *Monroe* court further stressed the significance of focusing on the child's needs by ruling that "no genetic information will be generated for use medically or historically." *Id.*

85. *Id.* at 772-73, 621 A.2d at 905 ("Significant to the best interest determination is the desirability, from the child's perspective, of establishing that the man that is the only father the child has ever known, the husband of the child's mother, and who has acknowledged the child, is in fact, not the child's father.").

86. *See id.* at 774, 621 A.2d at 905.

87. *Id.* at 774-75, 621 A.2d at 906.

88. *Id.* at 775, 621 A.2d at 906.

biological parent/child relationship.[89] The court further noted that "the relationship [to a third party often develops] in the context of a family unit and is fostered, facilitated and for most of the child's life, encouraged by the biological parent."[90] Accordingly, the *Monroe* court remanded the case for the trial court to consider fully "the universe of circumstances sufficiently exceptional as to warrant resolving a custody dispute against a biological parent in favor of a third party."[91]

4. Analysis.—

a. Blood Testing and the Child's Best Interests.—The *Monroe* case demonstrated that the General Assembly's confidence in the ability of scientifically reliable blood tests consistently to further the best interests of children in custody proceedings was unwarranted. First, the use of blood testing in *Monroe* directly conflicted with the legislative goal of legitimation of children born out of wedlock.[92] More significantly, blood testing in the *Monroe* custody context potentially violated the court's broader notion of a child's best interests, including the impact on the child's "emotional needs."[93] After *Monroe*, therefore, courts may not be required to routinely order and admit blood tests in a custody proceeding without first considering the best interests of the child under the "good cause" standard.[94]

In focusing on the child's interests, the *Monroe* court correctly disregarded the Court of Special Appeals's application of the equitable estoppel doctrine. Traditionally "interposed to guard against fraud," this doctrine primarily focuses on the dialogue between two competing parties.[95] In the custody context, therefore, the doctrine works to displace the crucial focus on the best interests of the child. Furthermore, it requires intrusive analysis of one party's past behavior to assess whether the other party relied to his or her "detriment" in acting

89. *Id.* at 775-76, 621 A.2d at 906. The *Monroe* court noted that the child psychiatrist who testified below referred to Mr. Monroe as Beth's "psychological father." *Id.* at 776, 621 A.2d at 907.

90. *Id.* at 775, 621 A.2d at 906.

91. *Id.*

92. *See supra* notes 74-75 and accompanying text.

93. *Monroe*, 329 Md. at 772, 621 A.2d at 905.

94. *See id.* at 769, 621 A.2d at 903 (asserting that "information which potentially undermines the best interest of the child, as well as the interest sought to be protected by the legitimation statutes" must first be subjected to a best interest inquiry); *see also supra* notes 79-85 and accompanying text (discussing the *Monroe* court's interpretation of the good cause standard).

95. Shipley v. Fox, 69 Md. 572, 579, 16 A. 275, 278 (1888).

as a parent to the child.[96] This type of inquiry perpetuates the image of the child as a proprietary burden. Additionally, the effort to find deceit within a relationship only heightens the adversarial nature of a proceeding specifically designed for equitable resolution.

While agreeing with the court's rejection of the equitable estoppel argument,[97] Judge Eldridge, in a strongly worded concurring opinion, objected, as he did in *Turner*, to the majority's treatment of the best interest inquiry as an evidentiary standard.[98] The focus of his objection, however, is misplaced in the custody context. He insists on relegating the central tenet in Maryland custody decisions—the best interests of the child—to a mere afterthought, important only "*after* considering all of the relevant evidence and appropriate presumptions."[99]

In contrast, the majority, led by Judge Bell, more logically concluded that such an inquiry should "*permeate[ ] the entire proceeding*, not simply the bottom line determination of in whose custody the child should be placed."[100] It could be argued that, if the best interest inquiry is to apply anywhere, it should be applied in the initial pretrial discovery stage, as this is the most crucial phase in determining the outcome of the proceeding. Too often the custody dispute is perceived as incident to the divorce proceeding, and therefore, is subject to treatment analogous to a marital property disposition.[101] After *Monroe*, trial judges, wielding significantly more discretion, can act as a protective shield for the child amidst competing parties and can offset the impact of damaging and perhaps irrelevant evidence in the custodial arrangement.[102]

The root of Eldridge's objection in *Monroe* seemed to lie in the discretionary latitude afforded trial judges after *Monroe* to consider

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96. *See* Petitioner's Brief at 23 ("To apply the doctrine of equitable estoppel to a paternity determination would be to intrude too deeply behind the domestic privacy.").

97. *Monroe*, 329 Md. at 778, 621 A.2d at 907 (Eldridge, J., concurring).

98. *Id.* at 781-82, 621 A.2d at 909-10 (Eldridge, J., concurring).

99. *Id.* at 782, 621 A.2d at 910.

100. *Id.* at 769, 621 A.2d at 903 (emphasis added).

101. *See* Mullinix v. Mullinix, 12 Md. App. 402, 411, 278 A.2d 674, 679 (1971) ("It must be borne in mind that the award of custody is not a prize to be handed by the court to the innocent or unerrant parent solely on the basis of his or her innocence or unerring ways.").

102. This discretion is more in keeping with the traditional role of the equity court in exercising the "parens patriae" power to protect minors under its jurisdiction. *See, e.g.*, Ross v. Pick, 199 Md. 341, 351, 86 A.2d 463, 468 (1952); Dietrich v. Anderson, 185 Md. 103, 116-17, 43 A.2d 186, 191-92 (1945); Montgomery Co. Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 414, 381 A.2d 1154, 1160 (1977).

the child's best interests before ordering blood tests.[103] The concern that the best interest standard often serves as a repository for judge-made values has sparked substantial debate.[104] It has been argued, for instance, that the *Monroe* court's extension of the "amorphous notion" of a best interest standard into the evidentiary stage will only breed more confusion in an already uncertain area.[105] This fear of discretion argument, however, is not persuasive enough to merit abandoning the best interest inquiry as a viable evidentiary standard. Given the highly emotional nature of the custody dispute, Maryland courts have long asserted that "there is no litmus paper test that provides a quick and relatively easy answer to custody matters."[106] It follows that blood testing, no matter how scientifically reliable, should not be allowed to be dispositive in the custody proceeding.

Moreover, several safeguards already exist that help offset biased judicial assessment of the child's best interests. These include the nature of the master-chancellor relationship[107] and the use of court-ordered custody investigations.[108] Additionally, the role of the child's attorney, recognized by the *Monroe* court as important in this regard, is a viable source for informing the best interest inquiry and maintain-

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103. *See Monroe*, 329 Md. at 782, 621 A.2d at 910 (Eldridge, J., concurring) (arguing that "the majority's view will allow a trial court to give effect to unilateral assertions while ignoring conclusive evidence as to paternity").

104. *See, e.g.*, R. Collin Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor*, 15 CREIGHTON L. REV. 25 (1981) (discussing judicial control over custody decisions and the constitutional limits on that control); Eileen M. Blackwood, *Race as a Factor in Custody and Adoption Disputes:* Palmore v. Sidoti, 71 CORNELL L. REV. 209 (1985) (discussing the significant judicial discretion afforded by the best interest standard and commenting on the recent constitutional limitations placed on this standard when considering race). The best interest inquiry also has been used to preclude homosexual parents from asserting custody rights. *See* Lisa M. Pooley, *Heterosexism and Children's Best Interests: Conflicting Concepts in* Nancy S. v. Michele G., 27 U.S.F. L. REV. 477, 482 (1993) ("Guided by myths and misconceptions regarding gays and lesbians, judges often deny lesbians the right to raise their children, holding such custody is contrary to the best interests of the child.").

105. *See Sanders*, 38 Md. App. at 419, 381 A.2d at 1163 ("The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication.").

106. *Id.*

107. After the master conducts an evidentiary hearing on the child's best interests, his or her recommendations are sent to the chancellor. Based on the evidence presented, the chancellor is then required to use independent judgment as to whether the custodial decision is in the best interests of the child. JOHN F. FADER, II & RICHARD J. GILBERT, MARYLAND FAMILY LAW § 20 (1990); *see also* Ellis v. Ellis, 19 Md. App. 361, 365, 311 A.2d 428, 430 (1973) (holding that a "gross miscarriage of justice . . . occurred" when the chancellor failed to exercise his own, independent judgment of the best interests of the child in awarding custody).

108. FADER & GILBERT, *supra* note 107, § 7.9, at 122-28.

ing the focus on the child.[109] As stated in *Turner*, the child's representative may, for example, request a protective order if the child's best interests would be jeopardized by blood testing.[110] Finally, perhaps the most logical solution to the excessive discretion concern is explicit legislation outlining the various "best interest" factors to be considered.[111] Many states already have such a provision to serve as a guide and thereby curb unsupported discretion.[112]

b. The Parental Presumption After Monroe.—While the precedential value of child custody cases is limited by the fact-centered nature of such decisions,[113] one far reaching consequence of *Monroe* may be that, in questioning routine reliance on blood testing, the Court of Appeals subtly undermined the biological presumption that exists in custody cases. After *Monroe*, trial courts will closely scrutinize the motive of a biological mother seeking to disestablish acknowledged paternity, particularly when she does not present the biological father. The biological mother, therefore, will be forced to frame her request for blood tests in terms of the child's best interests. This slightly higher evidentiary burden prevents a biological parent from resting solely on the *Ross* parental preference.

More significantly, if the burden is not met and the court concludes that the child will be adversely affected by the admission of blood test results, a biological mother may be precluded from taking advantage of any presumption in her favor. This possibility sparked a strong objection from Judge Eldridge, who argued that the majority

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109. Section 1-202 of the Family Law Article provides: "In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may: (1) appoint to represent the minor child counsel who may not represent any party to the action; and (2) impose against either or both parents counsel fees." MD. CODE ANN., FAM. LAW § 1-202 (1991); *see also Monroe*, 329 Md. at 772, 621 A.2d at 905 (noting the important role of the child's representative); Goldstein, *supra* note 48, at 66-67 (arguing that children in custody disputes should always be represented by legal counsel).

110. Turner v. Whisted, 327 Md. 106, 116, 607 A.2d 935, 940 (1992).

111. Appropriate guidelines for conducting a child's best interest inquiry in custody proceedings can be drawn from a wealth of resources. *See, e.g.*, RISA GARON ET AL., GUIDELINES FOR CHILD FOCUSED DECISION MAKING: A MANUAL FOR JUDGES, ATTORNEYS, MEDIATORS, MENTAL HEALTH PROFESSIONALS AND PARENTS CONCERNING CHILDREN OF DIVORCE (1993) (outlining the relevant considerations according to the child's developmental stage).

112. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-332 (Supp. 1984); COLO. REV. STAT. ANN. § 14-10-124 (West Supp. 1984); FLA. STAT. ANN. § 61.13(3) (West Supp. 1985); KY. REV. STAT. ANN. § 403.270 (Baldwin 1983); MONT. CODE ANN. § 40-4-212 (1983).

113. *See* Montgomery County Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 419, 381 A.2d 1154, 1162 (1977) ("There can be very little constructive or useful precedent on the subject of custody determinations, because each case must depend upon its unique fact pattern.").

failed to acknowledge the "constitutionally protected rights" of biological and adoptive parents.[114] Judge Eldridge, however, was too quick to condemn the majority's analysis as one-sided. As stated in *Turner*, and reiterated in *Monroe*, the "good cause" standard involves a careful weighing of "the *entirety* of the relationship between the child, the petitioner and the respondent."[115] The majority's analysis, therefore, did not sacrifice the biological parent's interest in favor of the child's; it merely re-evaluated the weight to be given the child's best interests. Moreover, although it is not as easily accessed, the *Monroe* court left the *Ross* presumptive standard essentially unchanged.

5. Conclusion.—In *Monroe*, the Court of Appeals countered routine reliance on the scientific validity of blood testing with a more humane and logical emphasis on its ultimate impact on the child's best interests. This best interest inquiry in turn undermined the inflexible reliance on the *Ross* biological presumption in the custody arena. The practical effect of *Monroe* will be the downplaying of the once overriding significance of biological ties and the emergence of the child's best interests as a more controlling inquiry. The *Monroe* decision signals an enlightened shift in focus from heated debates about parental and third party rights to an acknowledgement that, in custody disputes, "it is always the child who is not only the innocent victim, but who has the most at stake."[116]

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114. *Monroe*, 329 Md. at 782 n.4, 621 A.2d at 909 n.4 (Eldridge, J., concurring).
115. *Id.* at 767, 621 A.2d at 902 (emphasis added).
116. Ross v. Hoffman, 280 Md. 172, 173-74, 372 A.2d 582, 584 (1977).

IX. HEALTH CARE

A. *Who Decides when Patients Die?*

In *Mack v. Mack*,[1] the Court of Appeals addressed the issue of when a health care provider may withhold nutrition and hydration from a hospital patient who is in a persistent vegetative state, but who is not terminally ill.[2] The court ruled that, when deciding whether withholding nourishment is appropriate, courts should apply the "substituted judgment" doctrine to determine what treatment decision the patient would make if she were able to make one.[3] Moreover, the court held that clear and convincing evidence is necessary before determining that a patient's[4] "judgment was, or would be, that life-sustaining measures should be withdrawn."[5] Thus, the court imposed a severe burden of proof on patients' families who wished to stop the hydration and nutrition keeping their family member alive. In effect, the court required that families or guardians present "little other than explicit statements" made by the patient prior to entering into the vegetative state.[6] In so ruling, the court "required humans to exercise foresight [that] they do not [usually] possess"[7] and meet a standard that "is often impossible . . . , even when available evidence points to nontreatment as a perfectly reasonable course of action."[8]

1. The Case.—Ronald W. Mack has been a patient at Fort Howard Veterans' Hospital in Baltimore County since September 1983, when he was transferred there from a hospital in California to be

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1. 329 Md. 188, 618 A.2d 744 (1993).

2. *Id.* at 191, 618 A.2d at 746. The court also held that a potential guardian's desire to withdraw nutrition and hydration from a potential ward does not constitute good cause to disqualify that party from guardianship; *id.* at 199-206, 618 A.2d at 750-54, but this Note will limit its discussion to the issue of withdrawing sustenance from those in a persistent vegetative state.

3. *Id.* at 214-15, 618 A.2d at 757.

4. This Note uses the term "patient" to refer to previously competent individuals who are no longer considered competent because they exist in a persistent vegetative state with no hope of recovery. *See id.* at 192, 618 A.2d at 746 (defining a persistent vegetative state's distinguishing feature as "wakefulness without awareness").

5. *Id.* at 207, 618 A.2d at 753.

6. Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 391 (1988).

7. *Id.* at 391 n.74 (quoting *In re* O'Connor, No. 88-312, slip op. at 17 (N.Y. Oct. 14, 1988) (Simons, J., dissenting)).

8. *Id.* at 391. Within one year of the *Mack* decision, the General Assembly enacted the Health Care Decision Act, MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -618 (1994) to reduce the burdens on family members attempting to terminate the life support systems of patients in persistent vegetative states.

closer to his family.[9] While stationed in California as a member of the army, Ronald was involved in an automobile accident that caused him to suffer massive brain injuries and lose all consciousness.[10] Ronald was twenty-one years old at the time of his accident.[11]

The past ten years of inactivity have caused the muscles in Ronald's arms and legs to become moderately spastic.[12] He is incontinent of bladder and bowel and has a tracheotomy that periodically suctions his lung secretions.[13] Because he cannot chew or swallow, Ronald is fed through a gastrostomy tube.[14] There is "'no medically reasonable expectation'" that Ronald will ever recover or regain cognitive movement, but he feels no pain.[15]

In May 1984, the Circuit Court for Baltimore County appointed Ronald's wife of three years, Deanna Mack, guardian of Ronald's person.[16] A few months later, Deanna moved to Florida with their two children to be with a man with whom she had recently commenced a relationship.[17] By order of the Circuit Court for Baltimore County, Deanna was discharged as Ronald's guardian in December 1985.[18] In the meantime, however, she was appointed his guardian by the Circuit Court for Marion County, Florida.[19]

Sometime before May 11, 1991, Deanna learned that it was possible to have Ronald's gastronomy tube removed.[20] She subsequently consulted counsel in Florida regarding this possibility.[21] On May 11,

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9. *Mack*, 329 Md. at 192, 618 A.2d at 746. At the time, Ronald's wife and children lived near Fort Howard Veterans' Hospital, as did his father and younger sister. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* Ronald's "legs are straight and resist bending, while his arms are flexed, with the hands clenched, and resist straightening." *Id.*

13. *Id.*

14. *Id.* A gastrostomy tube is a means by which persons who are unable to eat or drink are provided with nutrition and hydration. *See id.* at 192-93 n.1, 618 A.2d at 746-47 n.1. Liquids are inserted "'into a functioning gastrointestinal tract, most commonly through the nose and esophagus into the stomach or through a surgical incision in the abdominal wall and directly into the stomach.'" *Id.* (quoting Joanne Lynn & James F. Childress, *Must Patients Always Be Given Food and Water?*, HASTINGS CENTER REP., Oct. 1983, at 17-18).

15. *Id.* at 193, 618 A.2d at 747 (quoting the circuit court's finding of fact).

16. *Id.*

17. *Id.*

18. *Id.* at 193-94, 618 A.2d at 747. Deanna has visited her husband three to four times a year since she moved to Florida. *Id.* at 194, 618 A.2d at 747. Ronald's sister, on the other hand, testified that she visits him "regularly" at the hospital. *Id.* Ronald's father testified that he usually visits his son once a week "with occasional intervals of two weeks between visits." *Id.*

19. *Id.* at 193-94, 618 A.2d at 747.

20. *Id.* at 194, 618 A.2d at 747.

21. *Id.*

Ronald's father and sister filed a complaint in the United States District Court for the District of Maryland and applied for a temporary restraining order against the Veterans Administration.[22] They alleged that Deanna was attempting to have a Florida state court order the Veterans Administration to transfer Ronald to a Florida hospital, where she would seek to terminate Ronald's life support systems.[23] The federal district court granted the order, and after a hearing, ordered the parties to determine who was to act as Ronald's duly authorized guardian.[24]

The Circuit Court for Baltimore County held that the appointment of Deanna as guardian by the Florida court was not entitled to full faith and credit.[25] It appointed a temporary guardian[26] and reserved judgment on the guardianship issue until a later hearing.[27]

Deanna argued in her pretrial memoranda that the circuit court "should order withdrawal of Ronald's feeding tube."[28] After a full hearing on this issue,[29] the circuit court determined that "absent either a living will or a power of attorney for health care, the decision to withhold sustenance should be based on what intent Ronald had, or would have, as determined under a clear and convincing standard of proof."[30] The court found insufficient evidence that Ronald would have desired to terminate his life support systems rather than exist in a permanent vegetative state.[31]

Deanna appealed to the Court of Special Appeals, but prior to that court's consideration of the matter, the Court of Appeals granted

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22. *Id.* The two actually filed a pro se pleading that the court treated as a complaint. *Id.*

23. *Id.*

24. *Id.* The court issued a preliminary injunction maintaining the status quo until the guardianship issue was resolved. *Id.*

25. *Id.* at 194-95, 618 A.2d at 747. The court held that "the Florida court had no jurisdiction over Ronald's person." *Id.*

26. *Id.* at 195, 618 A.2d at 747. The court designated the attorney who had served as Ronald's appointed counsel during the circuit court proceedings as Ronald's temporary guardian. *Id.*

27. *Id.*

28. *Id.*, 618 A.2d at 748.

29. *See id.*, 618 A.2d at 747. The court treated the withholding of nourishment issue as the principal question to be decided. *Id.*

30. *Id.*

31. *See id.* at 196, 618 A.2d at 748 ("'The conflicting and non-definitive testimony, recollection and impression from various individuals, eight years ago, does not convince the court, of what intent Ronald W. Mack had or would have if faced with the situation which presently confronts him.'") (quoting the circuit court's opinion). The circuit court further held that Ronald's father should be appointed guardian because Deanna's intention not to continue nutrition and hydration was inconsistent with "'the objectives and directives of Maryland law.'" *Id.* (quoting the circuit court's opinion).

a writ of certiorari.[32] In addition to the briefs filed by the parties,[33] various interested persons and agencies filed amicus briefs because of the important legal issues addressed.[34]

2. Legal Background.—

a. The Supreme Court's Holding in Cruzan.—In *Cruzan v. Missouri Department of Health*,[35] the Supreme Court held that the Constitution did not forbid Missouri from requiring that an incompetent patient's wishes as to the withdrawal of nutrition and hydration be proved by clear and convincing evidence.[36] Like Ronald, Nancy Cruzan entered into a persistent vegetative state after being injured in an automobile accident.[37] She too was kept alive by means of a gastrostomy feeding and hydration tube implanted in her stomach.[38]

The *Cruzan* Court began its discussion by recognizing that a patient's right to refuse treatment is a logical corollary of the common law informed consent doctrine.[39] The Court also stated that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[40] In cases examining the rights of a person in a persistent vegetative state, however, the Court noted that the person whose rights are at issue is incompetent.[41] Consequently, the majority held that Missouri's establishment of a "procedural safeguard to assure that the action of the surrogate conforms as best it

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32. *Id.*

33. The attorney for Ronald filed a brief as appellee, "supporting the circuit court decision in all respects." *Id.* at 197, 618 A.2d at 748-49.

34. Dr. Timothy James Keay of the University of Maryland School of Medicine filed a brief arguing that "current medical ethics permit discontinuing feeding Ronald through the gastrostomy tube." *Id.*, 618 A.2d at 749. The State filed a brief, arguing that the correct standard was applied by the circuit court. *Id.* Legal Aid Bureau, Inc. also filed a brief, urging the Court of Appeals "to adopt guidelines for determining when life support can be withdrawn from a patient in a persistent vegetative state." *Id.*, 618 A.2d at 748.

35. 497 U.S. 261 (1990).

36. *Id.* at 280.

37. *Id.* at 266.

38. *Id.*

39. *Id.* at 269-70. Justice Cardozo, then sitting on the New York Court of Appeals, described the common law informed consent doctrine, as applied to bodily integrity, as follows: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914).

40. *Cruzan*, 497 U.S. at 278; *see also* Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905) (holding that an individual had a liberty interest in declining an unwanted smallpox vaccine that should be balanced against the State's interest in preventing disease).

41. *Cruzan*, 497 U.S. at 280. Thus, the right would have to be exercised, "if at all, by some sort of surrogate." *Id.*

may to the wishes expressed by the patient while competent" was constitutionally valid.[42]

The Court held that the State has a particular interest at stake in cases such as *Cruzan*.[43] The Court found that while "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality,"[44] the State can place burdens in front of a guardian or surrogate wishing to terminate another individual's life to protect potential abuse from occurring in such situations.[45] It further held that Missouri had permissibly sought to advance its interests in preserving human life through the adoption of the clear and convincing standard of proof in such proceedings.[46] It acknowledged that such a high standard of proof generally would prevent an irrevocable erroneous decision from being made.[47]

b. Decisions from Other Jurisdictions.—The seminal right-to-refuse-treatment case is *In re Quinlan*,[48] in which the New Jersey Supreme Court granted the request of Karen Anne Quinlan's father to disconnect his daughter's respirator.[49] The court granted the relief, holding that Karen's constitutional right to privacy outweighed the State's interest in preserving her life.[50] The court held that the only "practical way" to protect Karen's privacy[51] was to allow her guardian and family to decide what action she would take if she were aware of her condition.[52] By allowing the family to decide, the New

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42. *Id.*

43. *Id.*

44. *Id.* at 281.

45. *Id.*; *see also In re* Jobes, 529 A.2d 434, 447 (N.J. 1987) ("There will, of course, be some unfortunate situations in which family members will not act to protect a patient.").

46. *Cruzan*, 497 U.S. at 283 ("[N]ot only does the standard of proof reflect the importance of a particular adjudication, it also serves as 'a societal judgment about how the risk of error should be distributed between the litigants.'") (quoting Santosky v. Kramer, 455 U.S. 745, 755 (1982); Addington v. Texas, 441 U.S. 418, 423 (1979)). The Court also explained that "[t]he more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Id.*

47. *See id.* (opining that an erroneous decision to continue life support "results in a maintenance of the status quo" and provides for the "possibility of subsequent developments such as advancements in medical science [or] the discovery of new evidence regarding the patient's intent . . . [whereas] [a]n erroneous decision to withdraw life-sustaining treatment . . . is not susceptible of correction").

48. 355 A.2d 647 (N.J.), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

49. *Id.* at 671-72.

50. *Id.* at 664.

51. The court defined this "privacy interest" as a party's interest in protecting herself from a medical intervention's "bodily invasion" of her person. *Id.*

52. *Id.* Quinlan left no directive for her family concerning whether she should be treated if she ever entered a persistent vegetative state. *Id.*

Jersey court adopted the "substituted judgment" test.[53] It did not, however, apply the clear and convincing evidence standard to determine the accuracy of the family's decision to terminate life support.[54]

The majority of state courts have adopted the *Cruzan* clear and convincing evidence standard in right to die cases.[55] In some instances, the standard is relatively easy to apply because the evidence is direct, due to either a patient's prior attainment of a living will or grant of a durable power of attorney.[56] In other cases, the evidence is not direct but still adequately satisfies the clear and convincing evidence standard. For example, in *In re Severns*,[57] the patient had not only expressed her clear intent not to be sustained on life support systems if she were ever in a persistent vegetative state, but also participated actively in the Delaware Euthanasia Education Council.[58]

In many cases, however, the evidence is unclear and the court is forced to make a determination of the matter by inferring from the facts. The Massachusetts Supreme Court addressed such a situation in

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53. *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1977) (defining substituted judgment as "taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person").

54. *See* Rhoden, *supra* note 6, at 384 (describing the "notion of proxies implementing the patient's right by deciding as the patient would have decided" and noting that, by adopting such a rights-based paradigm, the Quinlan court created a situation whereby future courts would attempt to protect patient's rights by using the "clear and convincing evidence" standard).

55. *See, e.g.*, Rasmussen v. Fleming, 741 P.2d 674, 691 (Ariz. 1987) (holding that "court-resolved disputes in [right-to-die] cases . . . must be resolved by clear and convincing evidence"); McConnell v. Beverly Enters.-Conn., Inc., 553 A.2d 596, 605 (Conn. 1989) (holding that the correct standard of proof is clear and convincing evidence); *In re* Estate of Longeway, 549 N.E.2d 292, 300 (Ill. 1990) (requiring clear and convincing evidence); *In re* Storar, 420 N.E.2d 64, 72 (N.Y.), *cert. denied sub nom.* Storar v. Storar, 454 U.S. 858 (1981) (holding that "clear and convincing" is the appropriate standard of review); *see also* ALAN MEISEL, THE RIGHT TO DIE § 8.3, at 24 ("The predominant standard is clear and convincing evidence."); Rhoden, *supra* note 6, at 376 (stating that the clear and convincing evidence standard is "the typical legal requirement" in such cases).

56. In Maryland, living wills permitting the withdrawal of nutrition and hydration were permissible under the former living will statute, MD. CODE ANN., HEALTH-GEN. § 5-605 (1990), and through a grant of a durable power of attorney under MD. CODE ANN., EST. & TRUSTS § 13-601 (1991). *See generally* Wendy A. Kronmiller, Comment, *A Necessary Compromise: The Right to Forego Artificial Nutrition and Hydration Under Maryland's Life-Sustaining Procedures Act*, 47 MD. L. REV. 1188 (1988) (discussing Maryland law regarding the removal of artificial nutrition and hydration).

57. 425 A.2d 156 (Del. 1980).

58. *Id.* at 158; *see also McConnell*, 553 A.2d at 598-99 (involving a former registered nurse, whose last position was as manager of a hospital emergency room, who "expressly and repeatedly told her family and her coworkers that, in the event of her permanent total incapacity, she did not want to be kept alive by any artificial means, including . . . feeding tubes").

Brophy v. New England Sinai Hospital, Inc.,[59] where it held that if direct evidence is unavailable, the substituted judgment of a guardian can be used to determine whether the patient's "choice would be to decline the provision of food and water and to terminate . . . life."[60] Significant to this finding were (1) the patient's expressed preferences related through the testimony of family and friends, (2) religious beliefs, (3) impact on the family, (4) probability of adverse side effects and, importantly, (5) the prognosis with and without treatment.[61] In *Brophy*, the court weighed all of these factors and concluded that the patient would not have wanted to live in a persistent vegetative state.[62]

In commenting on applying the clear and convincing evidence standard, the New Jersey Supreme Court has noted that express remarks sometimes will not alone be sufficient to overcome the burden of the test.[63] In *In re Conroy*,[64] the court noted that "an offhand remark about not wanting to live under certain circumstances made by a person when young and in the peak of health would not in itself constitute clear proof twenty years later that he would want life-sustaining treatment withheld under those circumstances."[65] Most courts agree that the standard requires more—that the evidence must show that a competent adult thought about the issue of life-sustaining treatment and expressed a desire to forego treatment "forcefully and without wavering" and that testimony of others indicates that foregoing treatment reflects the patient's values.[66]

A few jurisdictions have applied a less stringent test than the clear and convincing evidence standard. For example, in *In re Guardianship of Doe*,[67] the Supreme Judicial Court of Massachusetts held that the lack of a prior expressed intention regarding medical treatment does not bar the use of the substituted judgment doctrine to allow a guardian to make the decision to terminate treatment.[68] The court rejected

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59. 497 N.E.2d 626 (Mass. 1986).

60. *Id.* at 631.

61. *Id.*

62. *Id.* at 632. Brophy had discussed the case of Karen Anne Quinlan with his wife and stated, "I don't ever want to be on a life-support system. No way do I want to live like that; that is not living." *Id.* at 632 n.22. Five years later, he helped a man from a burning truck; when the man later died from extensive burns, Brophy stated, "I should have been five minutes later. It would have been all over for him . . . . If I'm ever like that, just shoot me, pull the plug." *Id.*

63. *See In re* Conroy, 486 A.2d 1209, 1230 (N.J. 1985).

64. 486 A.2d 1209 (N.J. 1985).

65. *Id.* at 1230.

66. *See* McConnell v. Beverly Enters.-Conn., Inc., 553 A.2d 596, 604-05 (Conn. 1989).

67. 583 N.E.2d 1263 (Mass.), *cert. denied sub nom.* Doe v. Gross, 112 S. Ct. 1512 (1992).

68. *Id.* at 1271.

the clear and convincing standard in favor of an approach in which "judges, mindful of the serious consequences following entry of substituted judgment orders, will enter such orders only after carefully considering the evidence and entering specific findings . . . and then balancing the various interests."[69] The New Jersey Supreme Court made a similar finding in *In re Jobes*,[70] where the majority found that there was no clear and convincing evidence of the patient's desire to terminate life support, yet held that, because "some trustworthy evidence" supported her family's decision that she would have approved of efforts to terminate life support, life-sustaining treatment should be stopped.[71]

c. The Common Law of Maryland.—The Court of Appeals has recognized the common law doctrine of informed consent[72] under the same rationale as has the United States Supreme Court.[73] In *Sard v. Hardy*,[74] the Maryland high court stated that the "fountainhead of the doctrine . . . is the patient's right to exercise control over his own body . . . by deciding for himself whether or not to submit to the particular therapy."[75] In *Wentzel v. Montgomery General Hospital, Inc.*,[76] the Court of Appeals examined whether, in conjunction with an application by coguardians to have an incompetent minor ward sterilized by means of a hysterectomy, the common law requires that courts examine the "best interests of an incompetent minor, the welfare of society or the convenience or peace of mind of the ward's parents or guardian."[77] It held that such factors should play no part in the court's analysis.[78] Thus, by analogy, the common law in Maryland does not support focusing on the best interests of a patient in determining whether life support should be terminated; rather, it indicates that courts should focus on the patient's right to refuse treatment,

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69. *Id.* The court referred to this standard as "a preponderance of the evidence with an extra measure of evidentiary protection by reason of specific findings of fact after a careful review of the evidence." *Id.* (citations omitted).

70. 529 A.2d 434 (N.J. 1987).

71. *Id.* at 447 ("Mrs. Jobes is blessed with warm, close, and loving family members. It is entirely proper to assume that they are best qualified to determine the medical decisions she would make.").

72. *See* Sard v. Hardy, 281 Md. 432, 438-39, 379 A.2d 1014, 1019 (1977) (holding that a physician is required to get "informed consent" from a patient before commencing treatment).

73. *See supra* note 39.

74. 281 Md. 432, 379 A.2d 1014 (1977).

75. *Id.* at 439, 379 A.2d at 1019.

76. 293 Md. 385, 447 A.2d 1244 (1982), *cert. denied*, 459 U.S. 1147 (1983).

77. *Id.* at 704-05, 447 A.2d at 1254.

78. *Id.*

and whether the patient would have wanted to continue living had she known she would someday be in a persistent vegetative state.[79]

d. The General Assembly's Intent.—Before the legislature enacted the Health Care Decision Act[80] in 1993, section 5-605 of the Health General Article stated, in pertinent part, that a qualified patient's request made on a living will to "withhold or withdraw life-sustaining procedures may not be implemented . . . [b]y the denial of food [or] water."[81] In contrast, section 13-708(b)(8) of the guardian statute states that a guardian has the power, if approved by the court, to withdraw "medical or other professional care" from an incompetent ward even when withholding such care may result in the ward's death.[82] In a 1988 opinion, the Attorney General reconciled this apparent contradiction by clarifying that the language of section 5-695 meant only that a living will could "not *itself* serve as the basis for withholding artificially administered sustenance."[83] The opinion further noted that "[e]very appellate court that has addressed the issue [of terminating life-support] has held that there is no difference as a matter of law between artificially administered sustenance and other forms of life-sustaining treatment."[84] Consequently, the Attorney General asserted that the guardian statute's failure to exclude artificially administered nutrition and hydration from its definition of medical treatment indicated that the General Assembly intended the cessation of artificially administered sustenance to be covered by the guardian statute.[85]

3. The Court's Reasoning.—Before *Mack*, the Court of Appeals had never addressed the issue of the standard of proof necessary to terminate the administration of nutrition and hydration of patients in a persistent vegetative state. The *Mack* court began its analysis of the standard of proof issue by citing with approval the Supreme Court's

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79. *See* Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 268-70 (recognizing the common law's support for a patient's right to refuse treatment).

80. MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -618 (1993).

81. MD. CODE ANN., HEALTH-GEN. § 5-605 (1990). This statute is deemed "former" in the text because it was amended after the *Mack* decision. *See supra* note 8.

82. MD. CODE ANN., EST. & TRUSTS 13-708(b)(8) (1991). Note that if the withholding of care involves a "substantial risk to the life of a disabled person," the guardian must first receive the court's authorization before withholding treatment. *Id.* § 13-708(c).

83. 73 Op. Att'y Gen. 162, 181 (1988) (emphasis added).

84. *Id.* at 179 (citations omitted); *see also In re* Riddlemoser, 317 Md. 496, 504 n.5, 564 A.2d 812, 816 n.5 (1989) (commenting that "the withdrawal of respiratory life-support or a gastric feeding tube is the termination of already existing medical treatment").

85. *See* 73 Op. Att'y Gen. at 181.

decision in *Cruzan*.[86] It then noted that it had previously applied the clear and convincing evidence standard in deciding punitive damages awards in similar types of cases[87] and in granting the request of a guardian to sterilize an incompetent ward.[88] Comparing those fact situations to the circumstances in *Mack*, the majority held that "[n]o lesser standard should be applied to deciding facts that will determine whether to withdraw life-sustaining treatment from a patient."[89] Finally, the court noted that in "the overwhelming majority of cases involving requests to withdraw sustenance from a person in a persistent vegetative state," courts have required clear and convincing evidence of the patient's wishes from the proponent of withholding or withdrawing life support.[90]

In contrast to the court's discussion, Deanna asserted that the clear and convincing standard unfairly favored life over death and thus left "'little room for debate on the issue.'"[91] She argued that the court should adopt a best interests standard of proof, which would vary depending on the quality of life of the patient.[92] Under such a standard, "'[w]hen the direct and indirect indicia of a disabled's intent are unclear, the last resort must be to do what a reasonable person in [the patient's] situation would want.'"[93]

The majority rejected the best interests test, holding that to terminate treatment for a person "who is not in pain, and who is not terminally ill requires [courts] to make . . . quality-of-life judgment[s] under judicially adopted standards, without any legislative guidelines."[94] The court quoted the Supreme Court of Illinois in support of its rejection of the standard: "'The problem with the best-interests test is that it lets another make a determination of a patient's quality of life, thereby undermining the foundation of self-determination and inviolability of the person upon which the right to refuse medical treat-

86. *See Mack*, 329 Md. at 207, 618 A.2d at 753-54.

87. *Id.* at 208, 618 A.2d at 754 (citing Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 469, 601 A.2d 653, 657 (1992)).

88. *Id.* (citing Wentzel v. Montgomery Gen. Hosp., Inc., 293 Md. 685, 703, 447 A.2d 1244, 1253-54 (1982)).

89. *Id.*

90. *Id.* (citations omitted); *see also supra* note 55 and accompanying text.

91. *Mack*, 329 Md. at 209, 618 A.2d at 755 (quoting Appellant's Brief at 35).

92. *Id.* Deanna argued that the only existence Ronald "has is as the 'subject of bodily intrusions that . . . are humiliating and undignified.' Furthermore, he forces others around him to wait on him and perpetuate his condition. He is condemned to life without hope of improvement and without any sensation of positive value." *Id.* at 217-18, 618 A.2d at 759 (quoting Reply Brief of Appellant at 6).

93. *Id.* at 218, 618 A.2d at 759 (quoting Reply Brief of Appellant at 7).

94. *Id.*

ment stands.'"[95] Thus, the court accepted the Attorney General's argument against the best interests test[96] and held that any analysis under that test would violate Maryland common law.[97] In addition, the court expressed a fear that if it applied the best interests test in *Mack*, courts might conclude that it is in the best interest of patients to die when they exist in a persistent vegetative state.[98] Thus, it would set a precedent for withholding artificially administered sustenance from all persons in a persistent vegetative state, even those "whose actual desires concerning the administration of such sustenance are unknown."[99] The court held that making such a broad-reaching societal judgment concerning the value of life properly belonged with the legislature.[100]

Although declaring the substituted judgment test a misnomer, the court in fact applied the test and attempted to determine by clear and convincing evidence whether Ronald would have desired a withdrawal of treatment had he been aware of the circumstances of his case.[101] The court held that because Ronald had not executed a medical durable power of attorney or a living will, the inquiry necessarily focused "on whether Ronald, while competent, sufficiently had evidenced his views . . . to enable the court to determine . . . what Ronald's decision would be under the present circumstances."[102]

The court determined that written and oral statements by Ronald were admissible, as was evidence of his character, his religious, philosophical, moral, and religious views, and his attitudes towards medical

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95. *Id.* (quoting *In re* Estate of Longeway, 549 N.E.2d 292, 299 (Ill. 1989)); *see also In re* Guardianship of Browning, 568 So. 2d 4, 13 (Fla. 1990) ("One does not exercise another's right of self-determination . . . by making a decision which the state, the family, or public opinion would prefer. The surrogate decisionmaker must be confident that he or she can and is voicing the *patient's* decision.") (citation omitted).

96. *See Mack*, 329 Md. at 220-21, 618 A.2d at 760. In a 1988 opinion, the Attorney General commented that according to medical experts, a person in a persistent vegetative state does not experience either physical or emotional suffering. 73 Op. Att'y Gen. 162, 189 (1988). Consequently, the Attorney General found the best interests test inappropriate because "[t]he balancing of costs and benefits *to the patient* that a surrogate must undertake for a terminally ill patient cannot be done in the same way for a patient who is permanently unconscious." *Id.* at 189-90.

97. *Mack*, 329 Md. at 219, 618 A.2d at 760. The Court of Appeals explicitly rejected the best interests test in Wentzel v. Montgomery Gen. Hosp., Inc., 294 Md. 685, 447 A.2d 1244 (1982), *cert. denied*, 459 U.S. 1147 (1983).

98. *Mack*, 329 Md. at 221, 618 A.2d at 761.

99. *Id.*

100. *Id.* at 222, 618 A.2d at 761.

101. *Id.* at 214, 618 A.2d at 757.

102. *Id.* at 215, 618 A.2d at 757-58. The court stated that the inquiry "is a particular application of a familiar judicial task, that of determining a person's state of mind, based on the evidence, and relating that state of mind to an applicable legal standard." *Id.*

procedures, sickness, suffering and death.[103] The court set forth these guidelines not to serve as a limitation on other forms of evidence, but to "'aid in ascertaining [the patient's] desires and in reaching a decision' based upon clear and convincing evidence."[104]

The court analogized its decision in *Mack* to the Massachusetts Supreme Judicial Court's decision in *In re Brophy*.[105] There was no direct evidence in either case that indicated the patient's desires concerning the continuation of treatment.[106] In contrast to *Brophy*, however, the *Mack* court was unable to infer from Ronald's previous statements his desire to forego artificial hydration and nutrition. The evidence that Deanna and Ronald's father offered was too conflicting.[107] Because *Mack* was a case in which the court did "not know what decision, if any, the patient had made or would make," the majority in *Mack* held that Deanna had "not met the burden of proof, requiring clear and convincing evidence of Ronald's desire to have the feeding tube removed."[108]

Justice McAuliffe dissented, arguing that the court merely paid "lip service to the concept of 'substituted judgment'" and applied it in such a limited way that it lost all meaning.[109] The test that Judge McAuliffe favored would "'ensure that the surrogate decisionmaker effectuates as much as possible the decision that the incompetent patient would make if he or she were competent.'"[110] Under McAuliffe's definition of the substituted judgment test, where family members could not reach a decision regarding the continuation of life support, the trial judge could look at all relevant evidence, including the patient's medical status, and make a decision.[111] Judge McAuliffe noted that Ronald could live in a persistent vegetative state for thirty to forty years.[112] Finding that Ronald's condition is permanent and irreversible, Judge McAuliffe stated that because most reasonable per-

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103. *Id.*

104. *Id.*, 618 A.2d at 758 (quoting *In re* Longeway, 549 N.E.2d 292, 300 (Ill. 1989)).

105. 497 N.E.2d 626 (Mass. 1986); *see also supra* text accompanying notes 59-62.

106. *Mack*, 329 Md. at 216, 618 A.2d at 758.

107. *Id.* at 217, 618 A.2d at 758-59 (noting that "[t]he trial judge found that '[i]f anything, the evidence produces a stalemate'").

108. *Id.*, 618 A.2d at 759.

109. *Id.* at 223, 618 A.2d at 761 (McAuliffe, J., dissenting).

110. *Id.* (quoting *In re* Jobes, 529 A.2d 434, 444 (N.J. 1987)). Judge McAuliffe stated the test as follows: "When prior statements alone do not provide the requisite evidence of intent, those seeking to ascertain the wishes of the ward should add to the relevant considerations all that is know about the ward and his condition and prognosis, and determine from that . . . information . . . the intent of the ward." *Id.* at 224, 618 A.2d at 762 (McAuliffe, J., dissenting).

111. *Id.* at 224-26, 618 A.2d at 762-63 (McAuliffe, J., dissenting).

112. *Id.* at 226, 618 A.2d at 763 (McAuliffe, J., dissenting).

sons would not want to continue life in such a condition, and absent evidence to the contrary, "one may certainly infer that Ronald would share that view."[113]

Judge Chasanow concurred with the majority's conclusion to continue Ronald's life support, but disagreed with its reasoning.[114] He argued that the majority's test had two problems: (1) most very young people like Ronald never seriously consider that they may one day "be reduced to a persistent vegetative state" and, thus, rarely if ever express their views on the matter clearly and convincingly, and (2) infants and incompetents will never satisfy the majority's test because they cannot clearly and convincingly evidence a desire not to be maintained on life support systems.[115]

In complete contradiction to the majority, Judge Chasanow argued that the trial court is not the most appropriate body to make the decision to terminate a patient's life.[116] Rather, he maintained that in all possible cases, the family should be able to make the decision without the need for judicial intervention and without the burden of the clear and convincing evidence standard.[117] Only in instances such as Ronald's, when family members disagree as to whether to terminate a patient's life support systems, should the courts play a role in so personal a decision.[118]

Judge Chasanow also criticized the majority for not expressly including in its list of determinative factors[119] "the opinions of those closest to the patient about what the patient would have chosen under

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113. *Id.* at 228, 618 A.2d at 764 (McAuliffe, J., dissenting). Judge McAuliffe stated that if "the evidence shows that the ward harbored religious, philosophical, or other beliefs in favor of the preservation of 'life' at all costs, no matter how barren and hopeless, the result would be different." *Id.*

114. *Id.* at 236, 618 A.2d at 768 (Chasanow, J., concurring). Judge Chasanow dissented from the majority's decision to remand the guardian issue to the trial court for further examination in light of all of the issues. *Id.* at 235, 618 A.2d at 768 (Chasanow, J., concurring). He found that the trial court properly decided the guardian issue. *Id.*

115. *Id.* at 236, 618 A.2d at 768 (Chasanow, J., concurring).

116. *Id.* at 239, 618 A.2d at 770 (Chasanow, J., concurring) ("The courts are less suited than the patient's loved ones, acting with concurrence of the patient's physicians, to make these decisions."); *see also* Michele Yuen, Comment, *Letting Daddy Die: Adopting New Standards for Surrogate Decisionmaking*, 39 UCLA L. REV. 581, 600 (1992) ("Although several courts initially suggested that the judicial system was the appropriate forum to decide whether life-sustaining treatment could be withdrawn from an incompetent patient, courts have more recently declined to require judicial intervention as a prerequisite to [the family and attending physicians] making such decisions.").

117. *Mack*, 329 Md. at 239, 618 A.2d at 770 (Chasanow, J., concurring).

118. *Id.* Due to the differing opinions of Ronald's father and Deanna, Judge Chasanow found that the trial court properly ruled that Ronald's life support should be continued. *Id.* at 238, 618 A.2d at 769 (Chasanow, J., concurring).

119. *See supra* text accompanying note 103.

the present circumstances."[120] While accepting as helpful the other factors put forward by the court, Chasanow posited that none can be as beneficial as "the opinions of the patient's loved ones who best knew the patient."[121] Judge Chasanow stated that such an approach, in contrast to the majority's reliance on competent choice, would give persons who never considered the issue, and infants who could not consider the issue, the chance to be treated as if they had been granted "the opportunity to develop or express their own views" concerning whether to live in a persistent vegetative state.[122]

In closing, Judge Chasanow chided the majority for looking for legislative guidance when it should have exercised judicial responsibility.[123] He warned that relying on the legislature would cause extremely personal decisions to be made under the guidelines of "objective criteria," possibly causing "the appalling specter of a patient meeting the legislature's criteria and being taken off life support despite the family's unanimous belief that the patient, though never expressing a view, would have chosen to continue to live."[124] Furthermore, Judge Chasanow convincingly stated that if a family makes an error, "then one patient may be harmed, but if the legislature establishes imperfect guidelines, then large numbers of patients and/or their families may be harmed."[125]

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120. *Mack*, 329 Md. at 242, 618 A.2d at 771 (Chasanow, J., concurring). Judge Chasanow declared this to be "the most probative and compelling evidence other than express statements by the patient." *Id.*

121. *Id.* at 243, 618 A.2d at 772 (Chasanow, J., concurring). Judge Chasanow found that the lay opinions were likely to aid "a judge who never knew the patient." *Id.; see, e.g.*, John F. Kennedy Memorial Hosp. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984) (holding that "close family members or legal guardians [should] substitute their judgment for what they believe the terminally ill incompetent persons, if competent, would have done under these circumstances"); *In re* Spring, 405 N.E.2d 115 (Mass. 1980) (approving an order terminating life support for an incompetent patient based on the patient's son's opinion that the patient would have wanted treatment withdrawn).

122. *Mack*, 329 Md. at 243-45, 618 A.2d at 772-73 (Chasanow, J., concurring); *see, e.g.*, Guardianship of Barry, 455 So. 2d 365, 371 (Fla. App. 1984) (holding that parents could decide, without court approval, based on their substituted judgment, to remove their infant child's life support system); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431-32 (Mass. 1977) (stating that parents could speak for their retarded child to aid the court's determination of whether the patient would choose not to undergo potentially life saving, but extremely painful (and, to the child, not understandable) chemotherapy).

123. *Mack*, 329 Md. at 249, 618 A.2d at 774-75 (Chasanow, J., concurring).

124. *Id.*, 618 A.2d at 775 (Chasanow, J., concurring).

125. *Id.*

4. Analysis.—In his concurrence, Judge Chasanow posed two probing questions that reveal serious problems with the majority's decision in *Mack*:

> Does the majority really believe that all people in a persistent vegetative state who have not clearly and convincingly evidenced their views about life support would prefer to remain on artificial life support indefinitely? Does the majority also believe that incompetent patients who have not sufficiently evidenced their views about life support would prefer that the legislature or a judge, rather than their loved ones, decide under what circumstances their artificial life support should be terminated?[126]

Whether the majority believed that patients would prefer these two scenarios, the outcome Judge Chasanow feared would have been the result of the court's decision in *Mack*[127] had the legislature not interceded. In 1993, the General Assembly enacted the Health Care Decision Act,[128] effectively codifying Judge Chasanow's approach to deciding whether to withhold life-sustaining nutrition and hydration.

The majority's decision was an attempt to further society's and the State's interest in preserving human life.[129] The court stated that "sustaining Ronald and other persons like him, whose desires concerning the withdrawal of artificial sustenance cannot clearly be determined, is a price paid for the benefit of living in a society that highly values human life."[130] While taking such a cautious approach was "calculated to prevent abusive terminations," the majority failed to acknowledge that it also ensures "abusive continuations."[131] Under the test set forth by the majority, patients who did not have the educational background, experience, or good fortune to formulate a living will, or grant a power of attorney, or even discuss the difficult moral

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126. *Id.* at 251, 618 A.2d at 775-76 (Chasanow, J., concurring).

127. *See* Rhoden, *supra* note 6, at 391 (stating that the "stringent [clear and convincing evidence] evidentiary standard . . . is often impossible to meet, even when available evidence points to nontreatment as a perfectly reasonable course of action").

128. MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -618 (1994). When it enacted the Health Care Decision Act, the General Assembly simultaneously repealed former §§ 5-601 to -614.

129. *See Mack*, 329 Md. at 222, 618 A.2d at 761.

130. *Id.* This basic tenet of the majority's position is not grounded on a solid proposition. As Judge Chasanow noted, "it is doubtful that society 'highly values' life in a persistent vegetative state." *Id.* at 236, 618 A.2d at 768 (Chasanow, J., concurring); *see also* Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 860 (1992) (noting that some public opinion polls show that nearly 90% of the public favor removing life-support systems from permanently comatose patients under certain circumstances).

131. Rhoden, *supra* note 6, at 434.

issues that right-to-die cases entail, would have been forced to live in a persistent vegetative state merely because they lacked the foresight or ability to express their desire not to be kept alive by means of artificially administered sustenance.[132]

The tests put forth by Judges Chasanow and McAuliffe would broaden the substitute judgment test adopted by the majority to provide a more equitable result for patients in persistent vegetative states.[133] Judge McAuliffe, however, would swing the balance too far in the opposite direction by creating a rebuttable presumption that patients do not desire to live in persistent vegetative states.[134] Under Judge McAuliffe's approach, patients who would prefer to live in a persistent vegetative state would nevertheless be deemed to prefer death unless adequate evidence proved otherwise.

Judge Chasanow's approach avoids such pitfalls. He would allow those who know the patient best to contribute their opinions to a judicial determination of whether the patient would, if competent, desire her treatment to end.[135] Such a decision-making matrix would not only provide individuals who have failed to make their desires known a greater degree of choice,[136] but also would prevent individuals, families, and society from being harmed by broad judicial or legislative policy statements that attempt to set forth guidelines for deciding an extremely complex moral and social issue.[137]

Judge Chasanow and the majority both reached the conclusion that Ronald should continue to receive hydration and nutrition artificially. If future cases had been controlled by the majority's holding in *Mack*, however, a guardian seeking to withdraw or withhold artificially administered nutrition and hydration, even if all family members agreed that the patient would so desire, would have to prove that the

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132. *See id.* at 391-92 n.74 (stating that the "'clear and convincing'" evidentiary standard is unworkable "'because it requires humans to exercise foresight they do not possess'") (citation omitted).

133. These approaches provide for the disparity between those who are aware of their options in the event of becoming incompetent in the future, and those who are not. Judge McAuliffe, however, placed more emphasis on the choice a reasonable person would make when confronted with living in a persistent vegetative state. *See Mack*, 329 Md. at 223-29, 618 A.2d at 762-65 (McAuliffe, J., dissenting). Judge Chasanow emphasized the importance of including family members' opinions in the trial court's factual determination. *See id.* at 229-51, 618 A.2d at 765-76 (Chasanow, J., concurring). This difference caused Judge McAuliffe to dissent while Judge Chasanow concurred.

134. *See id.* at 227-28, 618 A.2d at 764 (McAuliffe, J., dissenting).

135. *See id.* at 229-51, 618 A.2d at 765-76 (Chasanow, J., concurring).

136. *See* Kadish, *supra* note 130, at 879. Kadish contends that a court could determine "what a permanently incompetent person would now choose" by examining the patient's past life and values. *Id.*

137. *See supra* text accompanying note 121.

patient had, at some previous time, clearly and convincingly evidenced that desire. Fortunately, the General Assembly substantially made Judge Chasanow's well-reasoned approach the governing law when it enacted the Health Care Decision Act.[138] Those who know the patient best will now be able to step forward and prevent her from being forced to live a life that she would not have chosen to continue by artificial means, an event the majority's decision in *Mack* might have precluded.[139]

5. Conclusion.—The *Mack* court limited the possibilities for withdrawing and withholding the administration of artificial sustenance to patients in a persistent vegetative state by adopting a strict clear and convincing evidence standard. The court's holding would have prevented persons who were never competent, or who never made an express declaration as to their desires concerning treatment should they ever enter a persistent vegetative state, from receiving the benefit available to persons who did express their intent. By not allowing family members to give their opinion as to what the patient would have wanted, and by practically requiring express declarations, the court's holding necessarily would have resulted in persons being maintained by artificially administered sustenance, who, if given the choice, would have chosen death over continued life in a persistent vegetative state. Fortunately, the legislature answered the majority's call[140] and set forth reasonable guidelines for deciding when life support can be terminated.

WILLIAM S. HEYMAN

B. Physicians' Duty to Disclose HIV Status and Proof of Exposure Requirements in Fear of Disease Cases

In *Faya v. Almaraz*,[1] the Court of Appeals addressed the issues of whether a surgeon is negligent for failing to tell his patients that he is a carrier of the Acquired Immune Deficiency Syndrome (AIDS) virus[2]

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138. MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -618 (1994).

139. *See id.*

140. *See Mack*, 329 Md. at 222, 618 A.2d at 761 (stating that persons in Ronald's circumstances would be maintained in a persistent vegetative state "[u]nless and until current public policy, as we perceive it, is changed by the General Assembly").

1. 329 Md. 435, 620 A.2d 327 (1993).

2. *Id.* at 438, 620 A.2d at 328. AIDS is a condition caused by the human immunodeficiency virus (HIV), a microorganism that attacks the human immune system and ultimately destroys the body's ability to fight disease. HIV may be transmitted by vaginal and anal sexual intercourse, by the contamination of uninfected blood with HIV infected blood and blood products, and from mother to child during childbirth. Because of their

and whether a claimant can recover for fear of having contracted HIV without identifying any actual channel of transmission of the virus.[3] Reversing the lower court's dismissal of the case, the court determined that it could not rule, as a matter of law, that a physician owed no such duty to his patient[4] and that it would be unfair to require a claimant to prove actual exposure to the human immunodeficiency virus (HIV) to recover for fear of contracting AIDS.[5] In so ruling, the court adopted the minority view[6] as the standard in Maryland for recovery in claims alleging fear of disease.

1. The Case.—In 1988 and 1989, Dr. Rudolf Almaraz, an oncological surgeon specializing in breast cancer, performed surgery on Sonja Faya and Perry Mahoney Rossi at The Johns Hopkins Hospital (Hopkins).[7] At the time of these operations, Almaraz knew he was infected with HIV, the infectious agent responsible for AIDS.[8] By the time he performed Rossi's surgery in November 1989, Almaraz had developed secondary infections attendant to full-blown AIDS.[9] He died of AIDS in November 1990.[10]

Neither Faya nor Rossi knew of Almaraz's illness until December 1990 when they read about his death in a local newspaper.[11] Immediately upon learning that Almaraz was infected when he performed their surgeries, both Faya and Rossi underwent blood testing for the AIDS virus.[12] Both tested HIV-negative.[13]

Faya and Rossi filed separate actions against Almaraz's estate, his professional association, and Hopkins, seeking compensatory and punitive damages.[14] Both plaintiffs alleged negligence, failure to obtain

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impaired immune systems, persons with AIDS are highly susceptible to opportunistic infections and life-threatening diseases. AIDS is fatal. *See id.* at 439, 620 A.2d at 329; *see also* SAM B. PUCKETT & ALAN R. EMERY, MANAGING AIDS IN THE WORKPLACE 29-45 (Addison-Wesley 1988).

3. *See Faya*, 329 Md. at 455, 620 A.2d at 336-37.

4. *Id.* at 450, 620 A.2d at 334.

5. *See id.* at 455, 620 A.2d 337.

6. *See infra* notes 50-51 and accompanying text.

7. *Faya*, 329 Md. at 440, 620 A.2d at 329.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 441, 620 A.2d at 329.

13. *Id.* The court took judicial notice of the fact that at least 95% of all HIV carriers will test HIV-positive within six months of acquiring the virus. *Id.* at 446, 620 A.2d at 332. The court also noted that the blood tests available for detecting HIV, when used in combination, have an accuracy of more than 99.9%. *Id.* at 446 n.4, 620 A.2d at 332 n.4.

14. *Id.* at 441, 620 A.2d 329-30.

informed consent, fraud, and intentional infliction of emotional distress.[15] They claimed that Almaraz acted wrongfully in failing to inform them that he was HIV-positive prior to their operations and that Hopkins failed to take appropriate steps to prevent Almaraz from performing surgery without disclosing his HIV status to his patients.[16] Relying on agency principles, they asserted that Hopkins was vicariously liable for Almaraz's conduct.[17] They averred injuries in the form of "exposure to HIV and risk of AIDS," physical injury and financial costs associated with the blood testing, fear, anxiety, grief, shock, emotional distress, headaches, and sleeplessness.[18]

In May 1991, the Circuit Court for Baltimore County dismissed the complaints for failure to allege a legally compensable injury.[19] Finding that neither Faya nor Rossi alleged facts sufficient to support a claim of actual exposure to the AIDS virus during surgery and that neither Faya nor Rossi tested positive for HIV,[20] the court held that it could not, as a matter of law, allow recovery for "the fear that something that did not happen could have happened."[21] Faya and Rossi appealed to the Court of Special Appeals.[22] Before that court could consider the case, however, the Court of Appeals issued a writ of certiorari "to address the important and timely issues raised in these cases."[23] In a unanimous decision, the Court of Appeals reversed the Circuit Court's dismissal of the complaints and remanded the cases to the Circuit Court for further proceedings.[24]

2. Legal Background.—

a. Duty to Disclose HIV Status.—Under Maryland law, a physician has a duty to use the degree of care and skill expected of a reasonably competent practitioner of the same class and acting in the same or similar circumstances.[25] In malpractice actions alleging medi-

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15. *Id.*, 620 A.2d at 330. Faya also alleged negligent misrepresentation and breach of contract, and Rossi's complaint contained additional counts for loss of consortium, breach of fiduciary duty, and battery. *Id.*

16. *Id.* at 442, 620 A.2d at 330.

17. *Id.*

18. *Id.*

19. *See* Faya v. Almaraz, No. 90-345011, 1991 WL 317023 (Md. Cir. Ct. May 23, 1991); Rossi v. Almaraz, No. 90-344028, 1991 WL 166924 (Md. Cir. Ct. May 23, 1991).

20. *Faya*, 1991 WL 317023, at *4; *Rossi*, 1991 WL 166924, at *4.

21. *Faya*, 1991 WL 317023, at *4; *Rossi*, 1991 WL 166924, at *5.

22. *Faya*, 329 Md. at 443, 620 A.2d at 331.

23. *Id.*

24. *Id.* at 461, 620 A.2d at 339.

25. *See, e.g.*, Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 200, 349 A.2d 245, 253 (1975); Riffey v. Tonder, 36 Md. App. 633, 651, 375 A.2d 1138, 1148 (1977); Reed

cal negligence, a physician's conduct is measured against a national, rather than local, standard of care.[26] To state a cause of action against a physician for professional malpractice, a claimant must establish a lack of the requisite skill or care on the part of the physician and that such deficiency was the direct and proximate cause of the injuries suffered.[27]

The doctrine of informed consent, set forth in *Sard v. Hardy*,[28] imposes on physicians rendering medical treatment an additional, affirmative "duty to explain the procedure to the patient and to warn him of any material risks or dangers inherent in or collateral to the therapy, so as to enable the patient to make an intelligent and informed choice about whether or not to undergo such treatment."[29] A material risk is "one which a physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure."[30] The standard recognized by Maryland courts for determining whether a physician has fulfilled her obligation of obtaining informed consent is based on an assessment of what an ordinary patient would consider material.[31] Underlying this patient-

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v. Campagnolo, Misc. No. 1, 1993 Md. LEXIS 144, at *10 (Sept. 17, 1993). In *Reed*, the court noted that among the factors considered when evaluating a physician's conduct under this standard of care are: (1) advances made in the medical profession, (2) the availability of facilities, (3) whether the physician is engaged in a specialized or general practice, and (4) the proximity of specialists and special facilities. *Id.* (citing *Shilkret*, 276 Md. at 200-01, 349 A.2d at 249-51).

26. *See, e.g.*, Zeller v. Greater Baltimore Medical Ctr., 67 Md. App. 75, 86, 506 A.2d 646, 652 (1986); Muenstermann v. United States, 787 F. Supp. 499, 520 (D. Md. 1992).

27. *See, e.g., Reed*, 1993 Md. LEXIS at 144, *9; Suburban Hosp. Ass'n v. Mewhinney, 230 Md. 480, 484, 187 A.2d 671, 673 (1963).

28. 281 Md. 432, 379 A.2d 1014 (1977).

29. *Id.* at 439, 379 A.2d at 1020. This duty specifically requires that a physician reveal "the nature of the ailment, the nature of the proposed treatment, the probability of success of the contemplated therapy and its alternatives, and the risk of unfortunate consequences associated with such treatment." *Id.* at 440, 379 A.2d at 1020. In Maryland, "a cause of action for lack of informed consent is one in tort for negligence, as opposed to assault or battery." *Faya*, 329 Md. at 450 n.6, 620 A.2d at 334 n.6; *see also Sard*, 281 Md. at 440 n.4, 379 A.2d at 450 n.4.

30. *Sard*, 281 Md. at 444, 379 A.2d at 1022.

31. *See id.* at 443-44, 379 A.2d at 1021-22. In contrast to this patient-oriented standard whereby the materiality of risk is assessed from the perspective of a reasonable person in the patient's position, other jurisdictions continue to follow the traditional professional standard of materiality. *See id.* at 441-42, 379 A.2d at 1021. Under the traditional standard, the materiality of risk is a function of the judgement and discretion of a reasonable medical practitioner under similar circumstances. *See* Mark D. Johnson, Comment, *HIV Testing of Health Care Workers: Conflict Between the Common Law and the Centers for Disease Control*, 42 AM. U.L. REV. 479, 509-10 & n.180 (1993). Some courts follow a third, purely subjective standard under which a risk is deemed material if it would affect a patient's decision to

oriented, objective standard is the recognition of a patient's right of physical self-determination.[32] A physician is not required to communicate or explain all possible risks and complications, only those "material to the intelligent decision of a reasonably prudent patient."[33]

Prior to *Faya,* Maryland state courts had not addressed the issue of whether a physician infected with the AIDS virus or any other communicable disease has a duty to disclose her health condition to her patients.[34] Several other states have held, however, that the concept of "material risk" contained in the doctrine of informed consent may require the disclosure of information about the physician in addition to information about the treatment or procedure.[35] On the other hand, federal courts applying Maryland law have indicated that a physician's failure to disclose alleged incompetence and lack of surgical skill could not serve as the basis for an action for lack of informed consent under *Sard.*[36] The Fourth Circuit has noted that *Sard* leaves

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receive treatment. *Id.* at 510. For further discussion of these three standards and whether a physician's HIV status is "material information," see *id.* at 508-13.

32. *Sard,* 281 Md. at 444, 379 A.2d at 1021. The patient has the exclusive right to weigh the risks and alternatives with "his individual subjective fears and hopes and to determine whether or not to place his body in the hands of the physician or surgeon." *Id.* at 443, 379 A.2d at 1021.

33. *Id.,* 379 A.2d at 1022. A physician is not required to disclose obvious risks and may withhold information for therapeutic reasons or in emergency situations. *Id.* at 444-45, 379 A.2d at 1022.

34. A New Jersey court has recognized a physician's duty to disclose his HIV infection to his patient prior to invasive surgery. *See* Estate of Behringer v. Medical Ctr. at Princeton, 592 A.2d 1251, 1280 (N.J. Super. Ct. Law Div. 1991) (holding that the risk of a surgical accident involving an HIV-positive surgeon would be a legitimate concern to a patient, warranting disclosure of the risk of transmission within the context of informed consent); *cf. In re* Milton S. Hershey Medical Ctr., 595 A.2d 1290 (Pa. Super. Ct. 1991) (finding that, in light of the public health concern regarding the risk of transmission of HIV from an HIV-infected surgeon during invasive surgery, a hospital did not violate confidentiality laws by disclosing a physician's identity and his HIV-positive status to his colleagues and patients).

35. *See, e.g.,* Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (determining that a physician must disclose personal economic and research interests unrelated to the patient's health in obtaining the patient's informed consent to medical treatment); Hidding v. Williams, 578 So. 2d 1192 (La. Ct. App. 1991) (finding that a surgeon's failure to disclose chronic alcohol abuse, which created a material risk associated with the surgeon's ability to perform, violated informed consent requirements). For a comparison of the risk to patients from a physician's alcoholism with the risk associated with surgery by an HIV-positive surgeon, see Jane H. Barney, Comment, *A Health Care Worker's Duty to Undergo Routine Testing for HIV/AIDS and to Disclose Positive Results to Patients,* 52 LA. L. REV. 933, 949-51 (1992) (noting that with both alcoholism and HIV infection, the undisclosed risk is the doctor's disease).

36. *See* Shock v. United States, 689 F. Supp. 1424 (D. Md. 1988) (ruling that the plaintiff's claim that the competence of an attending physician was not disclosed or affirmatively represented raises no question of informed consent); Wachter v. United States (*Wachter I*), 689 F. Supp. 1420 (D. Md. 1988) (holding that the concept of informed consent does not

open the issue of whether "revelations of information about one's physician are within the scope of the duty to disclose . . . ."[37]

Outside the context of the physician-patient relationship, the Court of Appeals has recognized a legal duty to warn others of a foreseeable risk of contracting one's infectious disease. In *B.N. v. K.K.*,[38] the court held that a person who knows she has a highly infectious disease and can foresee that the disease may be communicated to others has a duty to take reasonable precautions, such as warning others or avoiding contact with them, to avoid transmitting the disease.[39]

b. Damages for Fear of Contracting AIDS.—Maryland courts have long recognized a right to recover for emotional injuries in tort. They do not adhere to the "physical impact rule," which denies recovery in tort for mental distress absent a showing a physical impact.[40] To discourage feigned and abusive claims, however, they apply a "physical injury test," allowing recovery for emotional suffering only if it resulted in a "physical injury."[41] In *Vance v. Vance*,[42] the Court of Appeals explained that, in the context of the physical injury test, the term "physical" means merely that which is "capable of objective manifestation."[43] As a consequence, evidence indicative of a mental state, such as spontaneous crying, depression, deteriorated physical appearance, sleeplessness and the inability to socialize, has served as an objective manifestation of emotional injuries sufficient to satisfy the physical injury test.[44]

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encompass misrepresentations as to a surgeon's competence, experience, or track record), *aff'd*, 877 F.2d 257 (4th Cir. 1989). According to the United States District Court for the District of Maryland, the doctrine of informed consent requires that a physician disclose the "nature and consequences *medically inherent* in a course of treatment so as to allow an intelligent and informed choice among treatment alternatives . . . ." *Shock*, 689 F. Supp. at 1426. Moreover, "[n]o case of lack of informed consent is made out unless the failure to disclose an 'alternative' to the treatment that the patient chooses to undergo is the proximate cause of damage to the plaintiff." *Watcher I*, 689 F. Supp. at 1421.

37. Wachter v. United States (*Wachter II*), 877 F.2d 257, 261 (4th Cir. 1989).

38. 312 Md. 135, 538 A.2d 1175 (1988).

39. *Id.* at 142, 538 A.2d at 1179.

40. *See* Green v. Shoemaker, 111 Md. 69, 77, 73 A. 688, 691 (1909) (rejecting the physical impact rule for judging emotional injuries in tort).

41. *See, e.g.*, Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (holding that a plaintiff can recover for nervous shock and fright absent physical impact so long as they result in apparent and substantial physical injury); H & R Block, Inc. v. Testerman, 275 Md. 36, 338 A.2d 48 (1975) (applying the same standard to "mental anguish damages").

42. 286 Md. 490, 408 A.2d 728 (1979).

43. *Id.* at 500, 408 A.2d at 733-34.

44. *See id.* at 501, 408 A.2d at 734.

Other jurisdictions have developed special rules governing the recovery in tort for emotional injuries consisting of a present fear of developing a disease in the future. The prevailing rule requires that, at a minimum, a claimant prove exposure to a disease-causing agent for the fear to be considered a legally compensable injury.[45] The majority of courts that have considered fear of disease cases, however, have held that exposure to a disease-causing agent alone is not sufficient to state a claim for fear of developing a disease in the future; the claimant also must show physical injury, such as symptoms of the disease, before the fear is considered compensable.[46] Prior to *Faya*, Maryland courts had not decided whether proof of exposure to a disease-causing agent or resultant physical injury were prerequisites to recovery for fear of developing a disease.[47]

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45. *See, e.g.*, Harper v. Illinois Cent. Gulf R.R., 808 F.2d 1139, 1140 (5th Cir. 1987) (holding that absent evidence of exposure to potentially harmful chemicals, plaintiff cannot recover for fear of future health hazards posed by exposure) (applying Louisiana law); Maddy v. Vulcan Materials Co., 737 F. Supp. 1528, 1533 (D. Kan. 1990) ("In cases claiming personal injury from exposure to toxic substances, it is essential that the plaintiff demonstrate that she was, in fact, exposed to harmful levels of such substances.") (applying Kansas law); *In re* Moorenovich, 634 F. Supp. 634, 637 (D. Me. 1986) (holding that proof that the plaintiff's anxiety was proximately caused by exposure to asbestos is a prerequisite to recovery for fear of cancer) (applying Maine law).

46. *See, e.g.*, Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986) (holding that a plaintiff cannot recover for fear of developing cancer in the future absent proof that he sustained an injury resulting from asbestos exposure) (applying Louisiana law); Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 413-14 (5th Cir. 1986) (ruling that the plaintiff's fear of developing cancer in the future, given his asbestosis caused by the inhalation of asbestos fibers, was a compensable present physical injury) (applying Mississippi law); Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir. 1985) (holding that exposure to asbestos absent manifest injuries is insufficient to constitute actual loss or damage under the F.E.L.A.); *In re* Hawaii Asbestos Cases, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (holding that a claimant seeking damages for fear of cancer due to asbestos exposure must show knowledge of functional impairment before the fear is considered reasonable) (applying Hawaii law); Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1367 (S.D. W. Va. 1990) (holding that mere exposure to toxic substances is not a physical injury upon which emotional distress damages may be recovered), *aff'd sub nom.* Ball v. Joy Technologies, Inc. 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 876 (1992); Bubash v. Philadelphia Elec. Co., 717 F. Supp. 297, 300 (M.D. Pa. 1989) (holding that in a claim for emotional injuries and fear of cancer, mere exposure to radiation is not an actionable physical injury) (applying Pennsylvania law); Sypert v. United States, 559 F. Supp. 546-47 (D.D.C. 1983) (ruling that the plaintiff could not recover mental anguish damages following exposure to active tuberculosis since the plaintiff did not develop the disease and therefore suffered no physical injury) (applying Virginia law); Plummer v. Abbott Labs., 568 F. Supp. 920 (D.R.I. 1983) (holding that women who ingested DES but suffered no physical symptoms could not recover for heightened fear of future medical problems); De Stories v. City of Phoenix, 744 P.2d 705, 707-08 (Ariz. App. 1987) (holding that absent proof that physical injury occurred or was likely to occur, exposure to asbestos dust is not a legally compensable injury).

47. Maryland courts have been reluctant to allow recovery for speculative future injuries. *See* Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 666, 464 A.2d 1020, 1026 (1983) ("In Maryland, recovery of damages based on future consequences of an injury may

The majority of courts that have addressed the issue of whether a claimant can recover in tort for the fear of developing AIDS have adopted the rule that recovery is contingent upon proof of actual exposure to HIV.[48] Following the majority rule applied in fear of disease cases outside the AIDS context, some courts have restricted recovery for fear of AIDS to those cases in which the plaintiff can establish that exposure to HIV resulted in a physical injury, which may take the form of an HIV-positive test result.[49] A small minority of courts has departed from the general rule that, at a minimum, a claimant must demonstrate actual exposure to the AIDS virus to recover for fear of

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be had only if such consequences are reasonably probable or reasonably certain. Such damages cannot be recovered if future consequences are 'mere possibilities.'").

48. The most frequently cited "AIDS phobia" case is Burk v. Sage Prods., Inc., 747 F. Supp. 285 (E.D. Pa. 1990). In *Burk*, a paramedic sustained a needle stick injury, but could not prove that the needle had come in contact with HIV-infected blood. The *Burk* court held that absent proof that the plaintiff was exposed to the AIDS virus, he could not recover for fear of contracting the disease. *Id.* at 288; *accord* Neal v. Neal, No. 19086, 1993 WL 228394, at *7 (Idaho Ct. App. June 29, 1993) (noting that "by imposing a standard of actual exposure, the law ensures that there exists a rational, non-speculative basis for the fear of developing [a] disease" and holding that a wife's fear of having contracted the AIDS virus as a result of husband's extra-marital affair was not compensable absent a showing that husband or husband's partner was infected with the virus); Ordway v. County of Suffolk, 583 N.Y.S.2d 1014, 1017 (N.Y. Sup. Ct. 1992) (holding that a surgeon did not have a viable claim for fear of having contracted the AIDS virus based on his operating on an HIV-infected patient absent any allegation of an unusual occurrence during the operation); Doe v. Doe, 519 N.Y.S.2d 595, 598-99 (N.Y. Sup. Ct. 1987) (holding that a wife failed to state a claim for fear of AIDS in an action based on her husband's failure to disclose that he had a homosexual relationship, since she made no allegation that she or her husband actually contracted the disease); Hare v. State, 570 N.Y.S.2d 125, 127 (N.Y. App. Div. 1991) (holding that a hospital employee's fear of AIDS after having been bitten by a patient rumored to be HIV-positive was not compensable since there was no proof that the patient was infected with the AIDS virus); Johnson v. West Va. Univ. Hosp., 413 S.E.2d 889, 894 (W. Va. 1991) (holding that recovery for fear of AIDS requires proof that the plaintiff was exposed to the AIDS virus as a result of a physical injury and that a police officer bitten by an HIV-infected person satisfied this requirement); Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp., 413 S.E.2d 79, 84 (W. Va. 1991) (holding that the mortician's fear of developing AIDS as a result of handling an HIV-infected corpse was unreasonable and not a legally compensable injury in the absence of actual exposure to HIV) (applying West Virginia law).

49. *See, e.g.*, Poole v. Alpha Therapeutic Corp., 698 F. Supp. 1367, 1372 (N.D. Ill. 1988) (ruling that the wife of a hemophiliac was to be denied recovery for fear of AIDS because, although she was within the "zone of danger," she failed to allege any physical injury or illness); Transamerica Ins. Co. v. Doe, 840 P.2d 288, 292 (Ariz. Ct. App. 1992) (holding that recovery for fear of AIDS would be denied where plaintiff could produce no evidence of physical injury or harm as a result of exposure to HIV); Petri v. Bank of N.Y., 582 N.Y.S.2d 608, 613 (N.Y. Sup. Ct. 1992) ("Someone who has been exposed to HIV infection but has not come down with it has not suffered a physical injury for which a recovery in damages may be allowed.").

developing AIDS.[50] In these cases, the plaintiff's fear of AIDS "was tied to a distinct event which could cause a reasonable person to develop a fear of contracting a disease like AIDS," such as a puncture wound from a hypodermic needle.[51]

3. The Court's Reasoning.—

a. Duty to Disclose HIV Status.—Although the trial court did not address the duty to inform issue, the Court of Appeals examined the question of duty and stated that it could not rule, as a matter of law, that "no duty was imposed upon Almaraz to warn the appellants of his infected condition or to refrain from operating upon them."[52] The court cited the foreseeability and seriousness of the potential harm,[53] as well as the professional and ethical guidelines set forth by the American Medical Association (AMA),[54] as factors to be considered when evaluating the existence of a legal duty.

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50. *See* Marchica v. Long Island R.R., 810 F. Supp. 445 (E.D.N.Y. 1993) (holding that the plaintiff could bring a F.E.L.A. action for fear of AIDS after having been pricked with a hypodermic needle, the source and contaminants of which were unknown); Castro v. New York Life Ins. Co., 588 N.Y.S.2d 695 (N.Y. Sup. Ct. 1991) (holding that a janitor who was pricked by a soiled, discarded hypodermic needle of unknown origin in an insurance company office had a viable cause of action for fear of AIDS); Carroll v. Sisters of St. Francis Health Servs., No.02A01-9110-CV-00232, 1992 WL 276717, at *3-5 (Tenn. Ct. App. 1992) (holding that a plaintiff, who sustained a needle prick from a discarded hypodermic needle in a hospital waste container, stated a viable cause of action for fear of AIDS even though she could not prove the needle was contaminated with HIV); *see also* Marriott v. Sedco Forex Int'l Resources, 827 F. Supp. 59 (D. Mass. 1993) (holding that a seaman could recover under the Jones Act for fear of contracting AIDS as a result of having been inoculated with a vaccine contaminated with HIV under either the strict exposure rule or the more lenient minority rule, because he tested HIV-positive and could prove direct exposure to the virus).

51. *Castro*, 588 N.Y.S.2d at 697.

52. *Faya*, 329 Md. at 450, 620 A.2d at 334.

53. *Id.* at 448-49, 620 A.2d at 333.

54. *Id.* at 450, 620 A.2d at 334. The Court noted that, according to the AMA,

> transmission of HIV from an infected physician to a patient has not yet been reported, but it is a theoretical possibility during invasive procedures. It is a long-standing AMA policy that when the scientific basis for patient protection policy decisions are unclear, the physician must err on the side of protecting patients. . . . HIV-infected physicians . . . should refrain from performing procedures that pose a significant risk of HIV transmission or perform these procedures only with the consent of the patient and the permission of a local review committee.

Id. (quoting the policy statement of the AMA House of Delegates).

Prior to Faya's and Rossi's surgeries, the Centers for Disease Control (CDC) published recommendations and guidelines for preventing the transmission of HIV (HTLV-III/LAV) from health care workers (HCWs) to patients, which stated:

> [A] risk of transmission of HTLV-III/LAV infection from HCWs to patients would exist in situations where there is both (1) a high degree of trauma to the patient

The court first applied its holding in *B.N.*,[55] that foreseeability of transmission of an infectious disease gives rise to a duty to inform others of the risk of infection or to refrain from risky contact, to the allegations in Faya's and Rossi's complaints.[56] In light of the foreseeability standard recognized in *B.N.*, the court stated that it could not rule, as a matter of law, that Almaraz had no duty to inform Faya and Rossi of his condition or to refrain from performing surgery since, based on their allegations, "it was foreseeable that Dr. Almaraz might transmit the AIDS virus to his patients during invasive surgery."[57] The court also stated that the low probability of transmission of HIV during invasive surgery did not alter its determination.[58] The court acknowledged that general tort principles, as well as Maryland case law, recognize that the "*seriousness* of potential harm . . . contributes to a

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> that would provide a portal of entry for the virus (e.g., during invasive procedures) and (2) access of blood or serous fluid from the infected HCW to the open tissue of a patient, as could occur if the HCW sustains a needlestick or scalpel injury during an invasive procedure. . . . Whether . . . restrictions are indicated for HCWs who perform invasive procedures is currently being considered.

Centers for Disease Control, *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 686, 691-95 (1985).

With respect to the management of infected HCWs, subsequent guidelines have stated:

> The question of whether workers infected with HIV—especially those who perform invasive procedures—can adequately and safely be allowed to perform patient-care duties . . . must be determined on an individual basis. These decisions should be made by the health-care worker's personal physician(s) in conjunction with the medical directors and personnel health service staff of the employing institution or hospital.

Centers for Disease Control, *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY & MORTALITY WEEKLY REP. 1, 1-18S (1987).

55. *See supra* notes 38-39 and accompanying text.

56. *Faya*, 329 Md. at 448, 620 A.2d at 333.

57. *Id.* Considerable debate exists within the medical community about the actual risk of transmission of HIV from an HIV-infected surgeon to patients during invasive surgical procedures. One comprehensive study estimates the risk to be between 0.3-0.4%. *See* Julie L. Gerberding & William P. Schecter, *Surgery and AIDS: Reducing the Risk*, 265 JAMA 1572 (1991). The *Faya* court noted that research conducted between 1985 and 1989 found no documented cases of HIV-transfer from a surgeon to a patient and that the risk of HIV-transfer from patients to health care workers has been estimated at 0.3% per exposure. *Faya*, 329 Md. at 332 n.3, 620 A.2d at 446 n.3. *See generally* Johnson, *supra* note 31, at 488 (citing research indicating that the emerging consensus in the medical community is that the risk of physician-to-patient transmission is small, but real). *But see* Larry Gostin, *Hospitals, Health Care Professionals, and AIDS*, 48 MD. L. REV. 12 (1989) (arguing that the risk of HIV transmission is too low to justify systematic screening of health-care workers or patients).

58. *Faya*, 329 Md. at 449, 620 A.2d at 333.

duty to prevent it,"[59] and reasoned that "[w]hile it may be unlikely that an infected doctor will transmit the AIDS virus to a patient during surgery, the patient will almost surely die if the virus is transmitted."[60]

The court did not look to the *Sard* doctrine when assessing whether Faya's and Rossi's pleadings on the duty issue were sufficient to overcome the defendant's motions to dismiss. At the conclusion of its discussion of legal duty, however, the court noted the patient-oriented standards for measuring a physician's duty to obtain informed consent set forth in *Sard*.[61] The court further stated that "negligence is a relative term, to be decided upon the facts of each particular case, and consequently, it is ordinarily a question of fact to be determined by the fact-finder."[62] Given Faya's and Rossi's factual allegations, the court concluded that it could not hold, as a matter of law, that "Dr. Almaraz was not guilty of negligence due to his claimed failure to communicate that he was HIV-positive."[63]

b. Recovery for Fear of Contracting AIDS.—The court next examined the trial court's determination that Faya and Rossi failed to state a legally compensable injury.[64] Having surveyed the rules governing recovery in fear of disease cases in and out of the AIDS context,[65] the court rejected the strict rules of actual exposure adopted by the trial court.[66] Reasoning that a rule making a plaintiff's recovery contingent upon proof of actual exposure to the AIDS virus would "unfairly punish [the plaintiff] for lacking the requisite information to do so,"[67] the court held that Faya's and Rossi's fear of contracting AIDS, without an allegation that they were actually exposed to the AIDS virus, was not initially unreasonable as a matter of law.[68]

To support its conclusion, the court relied on the rule adopted by a minority of courts that proof of actual exposure to HIV is not neces-

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59. *Id.* (citing Moran v. Faberge, 273 Md. 538, 543, 332 A.2d 11 (1975); RESTATEMENT (SECOND) OF TORTS § 293C cmt. c (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984)).

60. *Id.*

61. *Id.* at 450 n.6, 620 A.2d at 334 n.6.

62. *Id.* at 459, 620 A.2d at 339.

63. *Id.* at 459-60, 620 A.2d at 339.

64. *Id.* at 451, 620 A.2d at 334.

65. *See id.* at 451-55, 620 A.2d at 335-36 (discussing "AIDS phobia" cases). For further discussion, see *supra* notes 47-51 and accompanying text.

66. *See Faya*, 329 Md. at 455, 620 A.2d at 336-37. In particular, the court rejected the *Burk* rule, which served as the basis of the trial court's dismissal of Faya's and Rossi's complaints. *Id.* For further discussion of *Burk*, see *supra* note 48.

67. *Faya*, 329 Md. at 455, 620 A.2d at 337.

68. *See id.*

sary for plaintiffs to recover for fear of AIDS.[69] In particular, the *Faya* court cited the Tennessee intermediate appellate court ruling in *Carroll v. Sisters of St. Francis Health Services*.[70] In *Carroll*, the court held that a genuine factual dispute existed as to whether the plaintiff's fear of contracting AIDS was reasonable, even though the plaintiff, who was pricked by a soiled hypodermic needle in a hospital, could not prove exposure to the AIDS virus or physical injury in the form of an HIV-positive test result.[71] The *Carroll* court limited the plaintiff's recovery for mental anguish associated with fear of AIDS to the period of time beginning with the needle prick until the time that "other factors ma[de] the fear unreasonable."[72]

Following *Carroll*, the *Faya* court also limited the period of time for which damages relating to one's fear of contracting AIDS may be recovered. The court stated that "once [Faya and Rossi] learned of their HIV-negative status more than a year after their respective surgeries, the possibility of their contracting AIDS from Dr. Almaraz became extremely unlikely and thus, as a matter of law, might be deemed unreasonable."[73] The court ruled that they may seek recovery for "their fear and its physical manifestations" resulting from Almaraz's alleged negligence only for the time period constituting a "reasonable window of anxiety—that period between which they learned of Almaraz's illness and received their HIV-negative results."[74]

The court also discussed the standards under Maryland law for recovery of emotional injuries in tort. According to the court, *Vance* and its precursors set forth the rules that govern recovery for emotional injuries associated with the fear of developing a disease.[75] Following the rule of *Vance*, Faya and Rossi may recover for emotional suffering, fear and its physical manifestations proximately caused by Almaraz's alleged breach of a legal duty owed to them so long as they can objectively demonstrate the existence of the injuries.[76] In light of the court's determination in *Vance* that a deteriorated physical appearance and the inability to sleep or function normally were objective

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69. *See id.* at 453-54, 620 A.2d at 335-36; *see supra* notes 50-51 and accompanying text.

70. No. 02A01-9110-CV-00232, 1992 WL 276717 (Tenn. Ct. App. 1992) (reversing a lower court's grant of summary judgment to the defendant in an action seeking damages for fear of contracting AIDS).

71. *Id.* at *5.

72. *Id.*

73. *Faya*, 329 Md. at 455, 620 A.2d at 337. The court based its conclusion regarding the reasonableness of the fear on the scientific evidence that there is a 95% certainty that one will test HIV-positive within six months of exposure. *Id.*

74. *Id.* at 455-56, 620 A.2d at 337.

75. *Id.* at 459, 620 A.2d at 338-39; *see also supra* notes 42-44 and accompanying text.

76. *Faya*, 329 Md. at 459, 620 A.2d at 338-39.

manifestations of legally compensable injuries,[77] the court indicated that Faya's and Rossi's allegations regarding their fear of contracting AIDS and accompanying headaches and sleeplessness likewise fall within the scope of injuries recoverable under existing Maryland tort law.[78]

c. Other Counts.—The Court of Appeals concluded its opinion by stating that the trial court erred in not allowing a jury to assess the reasonableness of Almaraz's and Hopkins's alleged conduct or Faya's and Rossi's alleged emotional response to that conduct.[79] Since Faya and Rossi alleged the same damages in their other counts, the court concluded that the trial court's dismissal of all other counts because of the failure to aver a legally compensable injury was likewise premature and improper.[80] Moreover, the court found that Rossi and Faya alleged sufficient factual allegations as to Hopkins's representations that Almaraz was its agent to preclude a ruling that the complaints were legally insufficient to aver such an agency relationship.[81]

4. Analysis.—

a. Duty to Disclose HIV Status.—The court's determination that it could not rule, as a matter of law, that Almaraz had no duty to refrain from invasive surgical procedures is consistent with prior Maryland case law and traditional tort principles governing the standard of a physician's general duty of care.[82] The duty owed by a physician to her patient is, in part, measured by the prevailing customs and norms of the medical profession.[83] The practice and ethical guidelines of the AMA and CDC, for example, advise that a physician refrain from procedures that pose a significant risk of HIV transmission or perform such procedures only with the consent of the patient and the permission of a review committee.[84] Furthermore, in *B.N.*, the court imposed a general duty on all persons infected with a serious and contagious disease to refrain from conduct likely to jeopardize the

77. *Id.* at 458-59, 620 A.2d at 338 (discussing symptoms of mental states evidencing physical injuries in *Vance*).

78. *Id.* at 459, 620 A.2d at 338-39.

79. *Id.*, 620 A.2d at 339.

80. *Id.* at 460-61, 620 A.2d at 339.

81. *Id.* at 460, 620 A.2d at 339.

82. *See supra* notes 25-27 and accompanying text (discussing medical negligence standards under Maryland law).

83. *See supra* notes 25-26 and accompanying text.

84. *See supra* note 54 (quoting AMA and CDC practice and ethical guidelines regarding transmission of HIV from health care workers to patients).

health of others or to warn those at risk of the possibility of infection.[85] Whether Almaraz's activities posed a substantial risk to his patients raises a medical question beyond the expertise of the judiciary. The Court of Appeals properly refrained from removing the issues of duty and breach from the trier of fact in this action alleging negligence on the part of a physician.

The wisdom of the court's decision concerning Almaraz's duty to disclose his HIV status, however, is not so clear.[86] In concluding that it would not rule that Almaraz owed no duty to his patients to disclose his HIV infection before operating on them,[87] the court has suggested that a speculative risk[88] resulting from a personal attribute of a physician may be construed as a "material risk" that must be disclosed to a patient. Insofar as the court's opinion may indicate that a physician should inform her patients of her HIV infection before performing surgery, the decision suggests that a physician's duty under *Sard* is considerably broader in scope than prior decisions under Maryland law would indicate.[89] Under *Faya,* an assortment of physician specific information, including the condition of a physician's health as well as highly speculative risks inherent in the procedure or treatment, may be construed to fall within the scope of the patient-oriented concept of "material risk." This possible expansion of the physician's duty to obtain informed consent may create a considerable degree of uncertainty regarding the type of information physicians must disclose.[90]

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85. *See supra* notes 38-39 and accompanying text.

86. *See supra* notes 28-37 and accompanying text.

87. *Faya,* 329 Md. at 450, 620 A.2d at 334.

88. *See supra* note 57.

89. *See supra* note 36. The court only mentioned *Sard* in a footnote, however, and did not expressly state that the trial court's dismissal was improper given a physician's duty to obtain informed consent. *Faya,* 329 Md. at 450 n.6, 620 A.2d at 334 n.6.

90. For example, would a surgeon's drug addiction or the fact that she has worked a continuous double-shift constitute a "material risk"? A hospital's duty is also unclear. Will a hospital, under the principles of vicarious liability, be required to monitor its physicians' conduct in order to uncover behavior which may constitute a "material risk"?

Furthermore, an expanded duty to obtain informed consent could significantly increase the cost and complexity of health care administration. If a surgeon is required to tell her patients that she is a carrier of the AIDS virus, one may argue that other health-care workers, such as nurses or phlebotomists, pose a similar risk to patients and also should be required to disclose their HIV status. Once this duty to disclose is imposed upon health-care workers, the health-care industry may seek protection in the form of mandatory AIDS testing of all surgical patients. Who will pay for the administration and enforcement of mandatory testing of patients and health-care workers? Who will control the information once it is obtained?

Professor Karen Rothenberg has introduced a compromise position taking into account the right of privacy of health-care workers' and patients' right to information. *See* Karen H. Rothenberg et al., Comment, *The AIDS Project: Creating a Public Health Policy—*

b. Damages for Fear of Contracting AIDS.—In *Faya*, the Court of Appeals announced the Maryland rule for recovery in tort for the fear of having contracted the AIDS virus. A plaintiff may recover damages for fear of AIDS without showing actual exposure to the HIV virus until such time that factors, such as negative results of an HIV test, indicate that the fear is clearly unreasonable.[91] Unless the court chooses to distinguish AIDS from other diseases, the decision also is likely to set the standard in Maryland for fear of disease cases generally.

Despite the importance of this holding and the fact that it adopts a minority rule, the court offered only one justification for its decision: the majority rule making fear of disease damages contingent on proof of exposure to a toxin or disease-causing agent is unfair to plaintiffs.[92] While the court's interest in fairness to those whose health has been jeopardized by the wrongful acts of others is laudable, it is but one of the important concerns that should have guided the court in reaching its decision.

The *Faya* court did not properly address the main concern raised by the trial court and by those jurisdictions that have adopted the exposure rule, namely that fear of AIDS absent proof of exposure to HIV is too speculative to warrant legal compensation.[93] The physical injury test under *Vance*[94] and the "reasonable window of anxiety" limitation[95] imposed by the *Faya* court are inadequate to weed out unreasonable claims. These restrictions merely limit the type and quantity of damages that may be recovered; they provide no guidance for assessing when the basis for one's fear is irrational or too speculative to merit judicial consideration. Thus, the *Faya* court has made it possible for a claimant to pursue legal remedies, as did Faya and Rossi, for the fear that she was possibly exposed to a disease-causing substance and may possibly develop a disease in the future *if* the initial exposure actually took place.

Apart from its concern for fairness to plaintiffs, the court offered no additional justification for adopting the minority rule. This omis-

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Rights and Obligations of Health Care Workers, 48 MD. L. REV. 93, 124 (1989). She has stated that "[i]t may be best to pre-operatively inform each patient that there is a very small risk of HIV seroconversion from falsely negative blood transfusions and from unknowingly seropositive HCWs who bleed into the operative wound after an inadvertent skin puncture." *Id.*

91. *See Faya*, 329 Md. at 453-54, 455, 620 A.2d at 335-36, 337.

92. *Id.* at 455, 620 A.2d at 337; *see supra* notes 67-68 and accompanying text.

93. *See supra* note 21 and accompanying text.

94. *See supra* notes 42-44 and accompanying text.

95. *See supra* notes 73-74 and accompanying text.

sion is especially troublesome since the majority rule rationale—that to be actionable, the fear of disease "must be based on more than mere possibility of exposure to a disease or disease causing agent"[96]—conforms with Maryland case law. For example, in *Pierce v. Johns Manville Sales Corp.*,[97] the Court of Appeals held that recovery of damages based on future consequences of an injury is permitted only if such consequences are reasonably probable and not mere possibilities.[98] Furthermore, the rationale of *Carroll v. Sisters of St. Francis Health Services*,[99] which guided the *Faya* court, is suspect and offers no compelling reason for why the exposure rule should be rejected.[100]

The *Faya* court also failed to distinguish the facts of *Faya* from those cases in which courts have adhered to the minority view. In both *Castro v. New York Life Insurance Co.*[101] and *Carroll*, which were cited in *Faya*, the plaintiffs' fear of AIDS developed after they had been pricked by needles contaminated with unidentified substances.[102] Unlike Faya and Rossi, these plaintiffs' fear of AIDS was tied to a distinct event whereby transmission of the HIV virus was possible. Although transmission of HIV from a surgeon to a patient during invasive surgery is possible if a surgical accident occurs, neither Faya nor Rossi alleged an analogous event, such as a scalpel cut during surgery, whereby their blood and Almaraz's was allowed to commingle. Based on this distinction, one could argue that because of the *Faya* court's decision to permit recovery for fear of contracting AIDS absent proof of exposure to HIV or of an event whereby transmission of the virus was made possible, Maryland has adopted the most lenient standard in this country for recovery for fear of AIDS.

In addition, the court overlooked the unfair burdens on defendants that are likely to result from this decision. Given the *Vance* court's broad definition of "physical injury" and the *Faya* court's rejection of an exposure requirement, Maryland courts are likely to encounter a surge in the number of toxic tort litigants seeking recovery

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96. Neal v. Neal, No. 19086, 1993 WL 228394, at *7 (Idaho App. June 29, 1993).

97. 296 Md. 656, 464 A.2d 1029 (1983).

98. *Id.* at 666, 464 A.2d at 1026.

99. No. 02A01-9110-CV-00232, 1992 WL 276717 (Tenn. App. 1992).

100. In *Carroll*, the court reasoned that the plaintiff's fear of AIDS was reasonable, and hence, compensable, despite his inability to prove actual exposure to HIV, because it is "medically presumed" among health-care professionals that all body substances and all instruments have been contaminated with HIV. *Id.* at *4. Both the *Carroll* and *Faya* courts failed to consider that health-care workers presume all instruments and substances are HIV-contaminated as a safety precaution, not because this presumption accurately reflects the incidence of HIV contamination.

101. 588 N.Y.S.2d 695 (N.Y. Sup. Ct. 1991).

102. *See supra* notes 50-51 and accompanying text.

for fear of developing a disease. As a result of the *Faya* decision, Maryland may join a handful of courts that

> invite claims, and allow recovery, for the fear of AIDS where the plaintiff had undergone a blood transfusion, for the fear of developing tuberculosis based on evidence that a person coughed in the plaintiff's face, or for fear of cancer where the plaintiff had inhaled or ingested an unknown substance, all without any proof that a disease-causing agent was present.[103]

Not only will the court's ruling impose considerable financial hardships on parties required to defend against these lawsuits,[104] but the decision encourages intolerance and misunderstanding regarding the manner in which certain diseases are contracted or transmitted. The possibility alone of encouraging irrational fears of AIDS should have suggested to the court that further safeguards are needed before fear of a disease is deemed compensable.

5. Conclusion.—In *Faya*, the Court of Appeals addressed an interesting question regarding the scope of a physician's duty to obtain informed consent. More importantly, it failed to give adequate consideration to the effects likely to ensue from its determination that a plaintiff need not allege actual exposure to HIV in order to state a viable claim for fear of developing AIDS in the future. The court's decision is likely to serve as a general rule for recovery in tort for fear of having contracted a disease. It also is likely to encourage the filing of lawsuits by parties seeking compensation for irrational fears of developing a disease in the future.

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103. Neal v. Neal, No. 19086, 1993 WL 228394, at *7 (Idaho App. June 29, 1993).

104. The *Faya* decision has already begun to have an impact on "AIDS-phobia" litigation across the United States. *See, e.g.*, Kerins v. Hartley, No. B065917, 1993 Cal. App. LEXIS 883 (Cal. Ct. App. Aug. 27, 1993) (citing *Faya* in support of the decision to allow recovery for fear of AIDS absent proof of exposure to HIV).

X. INSURANCE

A. Automobile Insurance Rates and Older Drivers

In *Government Employees Insurance Co. (GEICO) v. Insurance Commissioner*,[1] the Court of Appeals held that insurance companies violate article 48A, section 240F of the Insurance Code when they automatically increase premiums for policyholders upon reaching age sixty-five.[2] To reach this conclusion, the court harmonized conflicting provisions of the Insurance Code through principles of statutory construction.

1. The Case.—In response to complaints that automobile insurance premiums increase when drivers turn sixty-five years of age, the Insurance Division of the State of Maryland conducted a hearing to review the rating practices of a number of insurers, including GEICO.[3] The purpose of the hearing was to determine if the rate increases complied with two provisions of the Insurance Code,[4] sections 240F[5] and 242(c)(2).[6]

The Commissioner found that GEICO based its rates on a number of factors, including age.[7] GEICO's rate structure incorporated a number of age categories, two of which grouped drivers aged fifty to sixty-four and sixty-five to seventy-four.[8] Each age category was assigned a different rating factor, which increased at age sixty-five.[9] The rating factor was multiplied by a base rate set by GEICO, resulting in higher premiums for a driver who moved from the age fifty to sixty-four category into the age sixty-five to seventy-four category, regardless of the driver's record.[10] The Commissioner did not dispute the actua-

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1. 332 Md. 124, 630 A.2d 713 (1993).

2. *See id.* at 126, 630 A.2d at 714; *see also* MD. ANN. CODE art. 48A, § 240F (1991).

3. *See GEICO*, 332 Md. at 127, 630 A.2d at 714-15.

4. *See id.*, 630 A.2d at 715.

5. MD. ANN. CODE art. 48A, § 240F (1991); *see infra* text accompanying note 27 (quoting § 240F).

6. MD. ANN. CODE art. 48A, § 242(c)(2) (1991); *see infra* text accompanying note 17 (quoting pertinent portions of § 242(c)).

7. *See GEICO*, 332 Md. at 127, 630 A.2d at 715 (quoting the Commissioner's findings).

8. *Id.*

9. Joint Record Extract at 124. The evidence presented to the Commissioner indicated that the rating factor for drivers aged 50 to 64 in Maryland was 0.73. *Id.* The effect of this rating factor was to set actual premiums for drivers in this category at 73% of the base rate. For Maryland drivers aged 65 to 74, actual premiums were set at 80% of the base rate because their rating factor was 0.80. *Id.*

10. *See GEICO*, 332 Md. at 128, 630 A.2d at 715. The higher rating factor was based on actuarial computations that reflected a higher rate of accidents among older drivers, as

rial justification for this practice, but ruled that GEICO violated section 240F by raising the premiums of drivers as they turned sixty-five.[11] Based on this ruling, the Commissioner ordered GEICO to discontinue use of the higher rating factor for drivers aged sixty-five and older.[12]

GEICO appealed to the Circuit Court for Baltimore City, which affirmed the Commissioner's decision.[13] Prior to consideration by the Court of Special Appeals, the Court of Appeals granted certiorari[14] and affirmed the circuit court's ruling.[15]

2. Legal Background.—

a. Statutory Provisions.—Section 242 of the Insurance Code contains guidelines by which automobile insurers must set their rates.[16] Relevant parts of this section provide:

> (1) Due consideration shall be given to (i) past and prospective loss experience within and outside this state; . . . (iii) past and prospective expenses both countrywide and those specially applicable to this State; . . . (viii) and to all other relevant factors within and outside this State.
> (2) Rates shall not be excessive, inadequate, or unfairly discriminatory. . . .
> . . . .
> (4) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. The standards may measure any difference among risks that are demonstrated objectively to the Commissioner

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well as a higher amount of claims paid by insurers. *See id.* at 127 & n.2, 630 A.2d at 715 & n.2. For Maryland drivers aged 50 to 64, there were 14.93 accidents per 100 drivers, resulting in $1809 in damages for each accident. Joint Record Extract at 124. For drivers aged 65 to 74, the accident frequency increased to 15.08 per 100 drivers, with $1806 in damages for each accident. *Id.* This increase in expected total dollar claims for drivers in the age 65 to 74 category resulted in premiums 7% higher for those drivers than for drivers in the age 50 to 64 category. *See id.*

11. *GEICO*, 332 Md. at 127-28, 630 A.2d at 715.

12. *Id.* at 128, 630 A.2d at 715.

13. *Id.*

14. *Id.* at 129, 630 A.2d at 715.

15. *Id.* at 126, 630 A.2d at 714.

16. *See* MD. ANN. CODE art. 48A, § 242(a) (1991). The Code exempts certain classes of insurers, but automobile insurers are not among those exempted. *Id.* § 242(b).

> to have had a direct and substantial effect upon losses or expenses.[17]

The purpose of section 242 is to "promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory."[18] A number of states have similar rating guidelines[19] and nearly identical provisions in their insurance codes, indicating that this public policy goal is not unique to Maryland.[20]

On its face, section 242 appears to sanction the actuarial justification GEICO relied upon in setting rates for its customers aged sixty-five and older.[21] In 1972, however, the General Assembly enacted section 240F of the Insurance Code,[22] thereby laying the groundwork for a judicial challenge to automobile insurers' rating practices with regard to older drivers.[23]

Section 240F succeeded an earlier statute that focused on the making of underwriting decisions (whether to insure a driver) on the basis of a driver's age.[24] The proposed bill underlying the statute prohibited basing underwriting decisions on the *advanced* age of the insured,[25] which the legislature believed was against public policy.[26] Today, section 240F provides:

> No policy or contract of motor vehicle insurance shall be cancelled or nonrenewed exclusively for the reason of age of the holder of the policy or contract, nor shall any premium therefor be increased exclusively for the reason of age beyond 65 years of an insured under the policy or contract.[27]

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17. *Id.* § 242(c).

18. *Id.* § 241.

19. *See, e.g.*, COLO. REV. STAT. ANN. § 10-4-403 (West Supp. 1993); HAW. REV. STAT. § 431:10C-202 (1988); LA. REV. STAT. ANN. § 22:1404 (West 1978).

20. *See, e.g.*, COLO. REV. STAT. ANN. § 10-4-403(1) (West Supp. 1993); HAW. REV. STAT. ANN. § 431:10C-202(1) (1988); LA. REV. STAT. ANN. § 1404(2) (West 1978).

21. *See GEICO*, 332 Md. at 129-30, 630 A.2d at 715.

22. Act of May 26, 1972, ch. 394, 1972 Md. Laws 1263.

23. Insurers are required to submit documents relevant to any rate changes to the Commissioner for review and for public inspection. MD. ANN. CODE art. 48A, § 242(d)(1)-(6). The Commissioner has the power to disapprove a rate filing before it becomes effective, during a 30-day review period after it becomes effective, or at any later time provided that a hearing is conducted. *Id.* § 242(f)(1)-(3). The rating practice found to violate § 240F in *GEICO* was not challenged until GEICO's 1988 rate filing was disapproved in 1992, 20 years after passage of the statute. Joint Record Extract at 51.

24. Act of April 23, 1969, ch. 175, 1969 Md. Laws 618.

25. *Id.*

26. LEGISLATIVE COUNCIL OF MARYLAND, REPORT TO THE GEN. ASSEMBLY OF 1969, at 124 (1969).

27. MD. ANN. CODE art. 48A, § 240F (1991).

Thus, as enacted, section 240F indicates an intent to prevent insurers from discriminating against drivers over the age of sixty-five in rate-setting practices as well as underwriting decisions.[28]

Section 240F appears in Subtitle 15 of the Insurance Code, which is entitled "Unfair Trade Practices." This subtitle includes several other sections prohibiting discrimination in underwriting and rate-setting.[29] In contrast to other provisions of subtitle 15, however, section 240F prohibits discrimination even where there is actuarial justification.[30] The absence of a clause permitting actuarially justified discrimination in section 240F, when such clauses appear in other sections, indicates the legislature's intent to preclude actuarially justified discrimination on the basis of age, but permit it on other bases, such as sex and physical disability. As well-recognized principles of statutory construction dictate, courts presume that any such omission was intentional on the part of the legislature[31] and refuse to "insert . . . words to make [the] statute express intentions not evident in its original form."[32]

The existence of section 240F alongside section 242 seemingly presents a conflict. An insurer applying section 242(c) might believe it permissible to raise premiums for a driver at age sixty-five since actuarial calculations support such an increase, while section 240F appears to prohibit such a measure.[33] To determine how an insurer should set its rates in the face of these conflicting directives, courts must look to traditional principles of statutory construction.

b. Statutory Construction: Harmonizing Provisions In Pari Materia.—As an aid to statutory interpretation, the Court of Appeals has traditionally relied on the long-held, though oft-criticized, canons of statutory construction.[34] The first canon requires an examination

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28. *See id.*

29. *See id.* §§ 226(c), 234A, 240F-1.

30. *Compare* § 240F *with* § 234A ("Actuarial justification may be considered with respect to sex") *and* § 240F-1 ("The premium for . . . motor vehicle insurance may not be increased solely because of the physical handicap or disability of the holder . . . unless there is actuarial justification.").

31. *See* American Sec. & Trust Co. v. New Amsterdam Cas. Co., 246 Md. 36, 41, 227 A.2d 214, 216-17 (1967) (stating that the absence of a term implied it was excluded on purpose).

32. State v. Patrick A., 312 Md. 482, 487, 540 A.2d 810, 812 (1988); *see also* Management Personnel Servs., Inc. v. Sandefur, 300 Md. 332, 341, 478 A.2d 310, 315 (1984).

33. *See supra* notes 17, 27 and accompanying text.

34. *See* Kaczorowski v. City of Baltimore, 309 Md. 505, 512, 525 A.2d 628, 631 (1987) ("[T]he canons have long been with us. To a considerable extent they are founded on both logic and common sense. Indeed, objections to them seem to be based more on the way in which they have been used, rather than on their content.").

of the language of the statute.[35] When, as in *GEICO*, two statutes may be read to lead to conflicting results, the rule is to search for the purpose or intent of the legislature.[36]

Sections 242(c) and 240F of the Insurance Code concern the same subject matter—rate-setting. As statutes *in pari materia*, they must be "interpreted with reference to one another and harmonized to the extent reasonably possible."[37] This rule applies even though section 240F was enacted long after and makes no reference to section 242(c).[38] "It is presumed that the General Assembly acted with full knowledge of prior legislation and intended statutes that affect the same subject matter to blend into a consistent and harmonious body of law."[39]

If harmonization is impossible,[40] the conflict is resolved by again looking to legislative intent, which "requires that the statute whose relevant substantive provisions were enacted most recently be held to have repealed by implication any conflicting provisions of the earlier statute."[41] Repeal by implication, while sometimes necessary, is not the solution preferred by the Court of Appeals.[42] Instead, the court attempts to reconcile the statutes, noting that "when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute."[43]

3. The Court's Reasoning; Analysis.—Although at first glance *GEICO* appears to implicate public policy issues concerning age discrimination, the court recognized that the sole issue in the case was one of

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35. State v. Bricker, 321 Md. 86, 92, 581 A.2d 9, 12 (1990) ("When interpreting a statute, the starting point is the wording of the relevant provisions.").

36. *See id.* ("In the event that ambiguity clouds the precise application of the statute, the cardinal rule of statutory construction is to ascertain and effectuate legislative intent."); *see also Kaczorowski*, 309 Md. at 516, 525 A.2d at 633 ("The [legislative] purpose, in short, determined in light of the statute's context, is the key.").

37. Farmers & Merchants Bank v. Schlossberg, 306 Md. 48, 56, 507 A.2d 172, 176 (1986); *see also* Coerper v. Comptroller of Treasury, 265 Md. 3, 6, 288 A.2d 187, 188 (1972) ("It is a hornbook rule of statutory construction that in ascertaining the intention of the General Assembly all parts of a statute are to be read together to find the intention as to any one part, and that all parts are to be reconciled and harmonized if possible.").

38. *See Farmers & Merchants Bank*, 306 Md. at 56, 507 A.2d at 176 ("This principle applies regardless of whether the statutes were enacted at different times and without reference to one another.").

39. *Bricker*, 321 Md. at 93, 581 A.2d at 12.

40. *See Farmers & Merchants Bank*, 306 Md. at 61-62, 507 A.2d at 179 (finding certain provisions of the Code to be irreconcilable).

41. *Id.* at 61, 507 A.2d at 178-79.

42. *See, e.g., id.* at 61, 507 A.2d at 178; White v. Prince George's County, 282 Md. 641, 644 n.2, 387 A.2d 260, 262 n.2 (1978).

43. *Farmers & Merchants Bank*, 306 Md. at 63, 507 A.2d at 180.

statutory construction.[44] Accordingly, the court began with an examination of the statutory language.[45] GEICO argued that since its premiums for drivers aged sixty-five and older were actuarially justified, its rates were never increased "exclusively" on the basis of age.[46] It, therefore, asserted that its rates did not violate section 240F and complied with section 242(c)(2)'s prohibition against "excessive, inadequate or unfairly discriminatory" rates.[47]

The Court of Appeals rejected GEICO's argument, reasoning that section 240F must do more than prohibit rate increases that are not actuarially justified.[48] Since section 242 already prohibited such rate-setting practices, GEICO's interpretation would mean that section 240F merely echoed section 242(c).[49] The court refused to apply the interpretation proffered by GEICO since the General Assembly expressed no such intent in the statute.[50]

Furthermore, by reading section 240F to allow rate increases based on actuarial justification, GEICO was attempting to add words to the statute.[51] The presence of other antidiscrimination statutes in the Insurance Code allowing actuarially justified discrimination shows that the General Assembly knew how to make such exceptions. Thus, the absence of such an exception in section 240F must be presumed to have been intentional.[52]

Section 242 generally permits insurers to base their rates on actuarial factors and group risks by classification for the establishment of premiums.[53] While drivers aged sixty-five and older are not mentioned, the Court of Appeals recognized that section 242 implicitly allows insurers to group these drivers and raise their rates if actuarially justified.[54] Conversely, section 240F specifically prohibits such rate increases.[55] Thus, the court recognized conflict between the two stat-

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44. *See GEICO*, 332 Md. at 131, 630 A.2d at 717.

45. *See id.* (citations omitted).

46. *See* Brief of Petitioners at 9.

47. *See GEICO*, 332 Md. at 133, 630 A.2d at 718; *see also supra* note 17 and accompanying text (quoting pertinent portions of § 242(c)).

48. *See GEICO*, 332 Md. at 133, 630 A.2d at 718.

49. *See id.* The Court of Appeals disfavors interpretations of statutes that render statutory language meaningless. *See, e.g.*, Management Personnel Servs. v. Sandefur, 300 Md. 332, 341, 478 A.2d 310, 315 (1984); White v. Prince George's County, 282 Md. 641, 644 n.2, 387 A.2d 260, 262 n.2 (1978).

50. *GEICO*, 332 Md. at 134-35, 630 A.2d at 718-19.

51. *See supra* note 32 and accompanying text.

52. *See supra* notes 30-32 and accompanying text.

53. *See supra* note 17 and accompanying text.

54. *GEICO*, 332 Md. at 134-35 & n.7, 630 A.2d at 718-19 & n.7.

55. *See supra* note 27 and accompanying text.

utes[56] and properly looked to the rules of statutory construction to resolve it.[57] The court interpreted the more specific statute, section 240F, as an exception to the general statute, section 242.[58] According to the court's rationale, section 242 enables insurers to raise rates on the basis of age, if actuarially justified, for all drivers except those sixty-five and older, who are protected by section 240F.[59] The court's reasoning was sound, as any other conclusion would have violated a canon of construction by rendering section 240F meaningless.[60]

GEICO also argued that the prohibition against actuarially justified rate increases for drivers sixty-five and over rendered the word "exclusively" in section 240F meaningless.[61] The Court of Appeals convincingly refuted this argument, citing as an example two drivers with identical driving records, one aged sixty-three and the other aged sixty-four.[62] The court noted that upon his next birthday, the second driver's rates would increase, while the first driver's rates would remain the same.[63] Since the second driver's rate, even though justified actuarially, would not have increased but for his turning sixty-five, the court reasoned that the increase was based "exclusively" on age.[64]

As a result of the *GEICO* court's decision, Maryland insurers can no longer automatically increase car insurance premiums for insureds upon their sixty-fifth birthday. Moreover, the court's analysis of the statutory provisions supports the conclusion that this was precisely the intent of the General Assembly when it enacted section 240F.[65]

Although properly decided from a legal perspective, the *GEICO* decision will arguably confer a windfall upon drivers aged sixty-five

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56. *GEICO*, 332 Md. at 135, 630 A.2d at 719.

57. *See id.* at 132-33, 630 A.2d at 718 ("Where provisions of one of the statutes deal with the common subject generally and those of the other do so more specifically, the statutes may be harmonized by viewing the more specific statute as an exception to the more general one.").

58. *Id.* at 135, 630 A.2d at 719.

59. *Id.*

60. *See supra* note 49 and accompanying text.

61. *See* Reply Brief of Petitioners at 7.

62. *GEICO*, 332 Md. at 136, 630 A.2d at 719.

63. *Id.* GEICO argued that a driver's rates might actually decrease at age 65, but this depends on a change in other factors. Petitioners' Brief at 9. An example of these other factors is the driver's retirement at age 65, resulting in fewer miles driven weekly and annually. *Id.* at 5. The example used by the Court of Appeals, however, is dependent on no change other than an increase in age from 64 to 65. *GEICO*, 332 Md. at 136, 630 A.2d at 719.

64. *GEICO*, 332 Md. at 136-37, 630 A.2d at 719-20. At proceedings before the Insurance Commission, GEICO's counsel conceded this conclusion reached by the Court of Appeals. *See* Joint Record Extract at 65-66.

65. *See supra* notes 58-59 and accompanying text.

and over. For example, insurers may continue to charge drivers under the age of twenty-five higher premiums because, as a group, they pose a higher risk of accidents and generate higher total claims, yet they may not increase rates for drivers over sixty-five even though, as a group, they also pose a higher risk.[66] In effect, the *GEICO* decision allows drivers over sixty-five to pay insurance premiums that do not cover the expenses they impose on the insurance system.[67] Thus, insurers will have to find other ways of covering these expenses. They could absorb the shortfall themselves, but it is more likely that they will spread the costs of the shortfall over the entire pool of insured drivers. Thus, drivers below age sixty-five will not only have to pay the full cost of the risk posed by their rating group, but also a portion of the cost posed by drivers over sixty-five. The Court of Appeals, however, correctly interpreted the statute; the anomalies caused by its decision are the result of flaws in the statutory scheme, not the court's reasoning. As the court noted, only the General Assembly can remedy the unfair effects of the statutory scheme.[68]

4. Conclusion.—In *GEICO*, the Court of Appeals held that section 240F of the Insurance Code prohibits insurers from automatically raising a driver's automobile insurance premiums upon reaching age sixty-five. In so holding, the court soundly applied the principles of statutory construction and properly forwarded the legislative intent to prevent insurers from setting premiums for older drivers in a discriminatory manner. Unfortunately, the decision may have the effect of insulating older drivers from paying the full cost of their insurance, unfairly shifting a greater financial burden onto drivers under the age of sixty-five.

SHAWN J. SEFRET

B. New Life for the Claims-Made Liability Policy in Maryland

In *T.H.E. Insurance Co. v. P.T.P. Inc.*,[1] the Court of Appeals modified its decision in *St. Paul Fire and Marine Insurance Co. v. House*[2] on the application of Article 48A, section 482 of the Code[3] to claims-made liability insurance policies. Adopting the reasoning of the *House*

66. *See* Brief of Petitioners app. at 6.

67. This discussion assumes that the insurance system is a closed universe, in which total premiums exactly cover total expenses imposed by those insured.

68. *GEICO*, 332 Md. at 137 n.8, 630 A.2d at 720 n.8.

1. 331 Md. 406, 628 A.2d 223 (1993).

2. 315 Md. 328, 554 A.2d 404 (1989).

3. MD. ANN. CODE art. 48A, § 482 (1991).

dissent, the court resolved the inherent tension between section 482 and claims-made policies[4] in favor of the insurer in situations where the insured submits a claim after the policy's termination.[5] In so doing, the court followed the national trend toward continuing the viability of the claims-made form of coverage,[6] a cost-effective innovation, which, if drafted with reasonable clarity, benefits both insurers and policyholders.

1. The Case.—In April 1987, P.T.P. Inc. ("P.T.P."), a corporation operating a waterslide and go-kart track near Ocean City,[7] obtained a comprehensive general liability policy from T.H.E. Insurance Company ("T.H.E.") through the brokerage of Atlantic Insurance Associates ("Atlantic").[8] The policy was effective from April 2, 1987, through April 2, 1988.[9] It insured against bodily injury and property damage claims submitted during that year, provided that the "occurrence" occasioning the claim transpired on or after April 2, 1987,[10] and the insured reported the occurrence on or before June 1, 1988, the last day of the policy's sixty-day extended reporting period.[11]

On August 27, 1987, a P.T.P. go-kart in which nine-year-old Lisa Buckley was a passenger collided with a barrier.[12] Buckley's mother treated her daughter's injuries at the scene,[13] and she and her daughter left the track without further medical assistance.[14] P.T.P. did not notify T.H.E. of this occurrence before its original policy with T.H.E.

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4. Inherent tension exists between notice-prejudice provisions, which tend to extend the permissible notice period, and claims-made policies, which strictly limit the notice period to the duration of the policy and cover only claims for which notice is given during the policy period.

5. *T.H.E. Ins. Co.*, 331 Md. at 408, 415-16, 628 A.2d at 224, 227-28.

6. *Id.* at 416, 628 A.2d at 228.

7. *Id.* at 408, 628 A.2d at 223; Brief of Appellant at 2.

8. *T.H.E. Ins. Co.*, 331 Md. at 408, 628 A.2d at 224.

9. *Id.*

10. *Id.* April 2, 1987, was the "retroactive date" for the policy; claims arising from occurrences preceding the retroactive date were not covered. *Id.* at 408 n.1, 628 A.2d at 224 n.1. Insurance policies commonly include retroactive dates to minimize the set of potential claims. *See* Sol Kroll, *"Claims Made"—Industry's Alternative: "Pay as You Go" Products Liability Insurance*, 637 INS. L.J. 63, 69 (1976).

11. *T.H.E. Ins. Co.*, 331 Md. at 412, 628 A.2d at 226.

12. *Id.* at 408, 628 A.2d at 223-24. Buckley's uncle was driving the kart. Brief of Appellant at 4. Interestingly, the T.H.E. policy at issue excluded coverage of accidents involving karts containing more than one person at a time. *Id.* at 26-35; Brief of Appellee and Cross-Appellant at 22-29; Brief of Appellees Atlantic Insurance Associates and Alfred V. Melson at 16-19. Although all parties raised this issue, the Court of Appeals chose not to address it.

13. *T.H.E. Ins. Co.*, 331 Md. at 408, 628 A.2d at 224. The injuries consisted of pancreatic damage and a lip laceration. Brief of Appellant at 4.

14. *T.H.E. Ins. Co.*, 331 Md. at 408, 628 A.2d at 224.

expired on April 2, 1988.[15] T.H.E. granted P.T.P. a renewal policy for the period from May 27, 1988 to May 27, 1989.[16] The renewal policy, like the original, only covered claims arising from occurrences that transpired on or after the first date of coverage.[17]

On June 6, 1988, sixty-five days after the initial policy's expiration and five days after the end of its extended reporting period, counsel for Buckley submitted to P.T.P. a written claim for damages arising from the August 27, 1987 accident.[18] Subsequently, P.T.P. informed Atlantic, which notified T.H.E.[19] On June 23, 1988, T.H.E. denied coverage of the Buckley claim.[20]

Buckley then filed an initial action, which ultimately was transferred to the United States District Court for the District of Maryland.[21] T.H.E. did not defend in this action.[22] On April 18, 1990, P.T.P. filed a complaint against T.H.E., Atlantic, and Atlantic's president, Alfred Melson, seeking a declaratory judgment on T.H.E.'s obligation to defend and indemnify for the Buckley claim. P.T.P. also claimed damages for breach of the insurance contract,[23] and further alleged negligence against Atlantic and Melson, both of whom cross-claimed against T.H.E.[24] All parties moved for summary judgment.[25] The trial court granted summary judgment for P.T.P., establishing T.H.E.'s obligation to defend and indemnify and awarding damages.[26] T.H.E. appealed to the Court of Special Appeals.[27] The Court of Appeals, however, granted certiorari on its own motion to resolve the

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15. *Id.*

16. *Id.* P.T.P. unsuccessfully argued that, because during preliminary negotiations T.H.E. and Melson designated the policy a "renewal," trade norms demanded continued coverage of occurrences transpiring after the *initial* policy's retroactive date. Furthermore, P.T.P. alleged that after T.H.E. received the Buckley claim, it "improperly advanced the retroactive date" in the renewal policy under negotiation. Brief of Appellee and Cross-Appellant at 3-5. Appellee Alfred Melson, President of Atlantic, also alleged that T.H.E.'s underwriter assured Melson that the renewal policy would contain the original policy's retroactive date and would afford continuous coverage. Brief of Appellees Atlantic Insurance Associates and Alfred V. Melson at 3.

17. *T.H.E. Ins. Co.*, 331 Md. at 408, 628 A.2d at 224.

18. *Id.*

19. *Id.*

20. *Id.* at 408-09, 628 A.2d at 224.

21. *Id.* at 409, 628 A.2d at 224.

22. *Id.*

23. *Id.*

24. *Id.* The basis of the negligence claim was failure to place proper insurance coverage. *Id.*

25. *Id.*

26. *Id.* at 409-10, 628 A.2d at 224-25. The trial court based the amount of damages on P.T.P.'s cost of defense. *Id.*

27. *Id.* at 410, 628 A.2d at 225.

issue of section 482's applicability to claims filed after the expiration date of claims-made policies.[28]

2. *Legal Background.*—Section 482 is a notice-prejudice provision that forbids "any insurer" to deny coverage solely because the insured has breached the policy by not cooperating with or not giving the requisite notice to the insurer, unless the insurer establishes by a preponderance of affirmative evidence that the noncooperation or inadequate notification actually prejudiced its interests.[29] Notice-prejudice provisions exist in a majority of states by legislative, administrative, or judicial creation.[30] They serve two purposes: to protect insureds from inequitable forfeitures of purchased coverage on immaterial grounds,[31] and to protect insurers' interests in obtaining reasonably complete and prompt information on which to base investigations and construct defenses.[32]

The General Assembly enacted section 482 in response to the 1963 Court of Appeals decision in *Watson v. United States Fidelity & Guaranty Co.*[33] In *Watson*, the court applied a strict contractual analysis to the notice provision of an occurrence-type automobile liability policy and concluded that, as a condition precedent to coverage, the

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28. *Id.*

29. MD. ANN. CODE art. 48A, § 482 (1991). Section 482 also applies to persons "claiming the benefits of the policy through the insured." *Id.*

30. Georgia, Maryland, Massachusetts, Texas, and Wisconsin have notice-prejudice statutes or regulations; Alaska, Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, the Virgin Islands, Washington, and West Virginia have recognized a notice-prejudice rule judicially. Charles C. Marvel, Annotation, *Modern Status of Rules Requiring Liability Insurer to Show Prejudice to Escape Liability Because of Insured's Failure or Delay in Giving Notice of Accident or Claim, or in Forwarding Suit Papers*, 32 A.L.R. 4th 141 (1984 & Supp. 1993); *see also* cases cited *infra* notes 67-76 and accompanying text.

31. *See, e.g.*, Cooper v. Government Employees Ins. Co., 237 A.2d 870, 873-74 (N.J. 1968) (holding that allowing forfeiture of coverage without prejudice to insurers "would be unfair to insureds"); Brakeman v. Potomac Ins. Co., 371 A.2d 193, 197 (Pa. 1977) ("We are reluctant . . . to allow an insurance company to refuse to provide that which it was paid for unless a sound reason exists for doing so."); *see also* Daniel W. Whitney, Note, *A Legal Process Analysis for a Statutory and Contractual Construction of Notice and Proof of Loss Insurance Disclaimers*—Government Employees Insurance Co. v. Harvey, 38 MD. L. REV. 299, 309-10 (1978) (arguing that permitting insurers to disclaim liability without prejudice creates an "unjustifiable windfall" for the insurer and an "unreasonable forfeiture" for the insured).

32. *See Brakeman*, 371 A.2d at 197.

> The purpose of a policy provision requiring notice of an accident or loss to be given within a certain time is to give the insurer an opportunity to acquire, through an adequate investigation, full information about the circumstances of the case, on the basis of which, it can proceed to disposition . . . .

Id.

33. 231 Md. 266, 189 A.2d 625 (1963).

policy required the insured to notify the insurer of an occurrence "as soon as practicable."[34]

Watson involved an accident that occurred on March 5, 1961, which the insured appellant did not report to the insurer until April 10, 1961.[35] Although the accident occurred within the policy period, the insurer preliminarily disclaimed coverage on the basis of late notice.[36] The insurer then sought and received a declaratory judgment that it had no liability for claims arising from the accident.[37] In awarding the declaratory judgment, the Court of Appeals disregarded the appellant's contention that the modern trend was to forbid the insurer to disclaim its obligation on the basis of late notice unless it showed actual prejudice.[38] Validating the prompt-notice provision as a condition precedent to coverage, the Court of Appeals held that the insurer could deny coverage on the sole basis of late notification without proof that it actually prejudiced its investigation or interests.[39]

To counteract this harsh judicial rule, the General Assembly enacted section 482 in 1964. Like the notice-prejudice rule in many states, it predated the widespread availability of claims-made insurance policies,[40] which provide coverage in a manner essentially opposite to the traditional occurrence policy.[41] Because these notice-prejudice rules were drafted or judicially created in the context of the occurrence form of coverage, they are often in tension with the language and purpose of claims-made policies.[42]

The occurrence policy represents the traditional form of liability insurance coverage, in which the event insured against is the actual

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34. *Id.* at 271, 189 A.2d at 627.

35. *Id.* at 269-70, 189 A.2d at 626.

36. *Id.* at 270, 189 A.2d at 626-27.

37. *Id.* at 269, 189 A.2d at 626.

38. *Id.* at 272, 189 A.2d at 627.

39. *See id.* at 272-73, 189 A.2d at 627-28.

40. *T.H.E. Ins. Co.*, 331 Md. at 416, 628 A.2d at 228. The claims-made form of coverage did not develop widespread acceptance until the late 1960s or early 1970s. John K. Parker, *The Untimely Demise of the "Claims Made" Insurance Form? A Critique of* Stine v. Continental Casualty Company, 1 DET. C.L. REV. 25, 28-29 (1983); Sol Kroll, *The Professional Liability Policy "Claims Made,"* 13 FORUM 842, 849-50 (1978).

41. *See* Parker, *supra* note 40, at 27. Parker reasoned:

> In a sense, these two forms of insurance are opposites. Generally speaking, "occurrence" policies cover liability inducing events occurring during the policy term, irrespective of when an actual claim is presented. Conversely, "claims made" . . . policies cover liability inducing events if and when a claim is made during the policy term, irrespective of when the events occurred.

Id.

42. *See supra* note 4.

mishap.[43] Once the "occurrence" takes place within the policy period, coverage attaches regardless of whether or when the injured party officially presents a claim.[44] The claims-made policy is a more recent, less intuitive form of coverage consisting of two subtypes. In a "pure" claims-made policy, the event insured against is the injured party's claim against the insured, regardless of whether the injured party submits that claim to the policyholder or directly to the insurer.[45] In a "reporting" claims-made policy, the event insured against is the insured's report to the insurer of the injured third party's demand for relief.[46] Under both types, once the claim is presented to the appropriate party, coverage attaches, regardless of the date of the occurrence out of which the liability arose.[47]

When applied to occurrence policies, notice-prejudice provisions merely extend the permissible lapse of time between a covered occurrence and the insured's notice to the insurer. When applied to claims-made policies, however, notice-prejudice provisions alter the fundamental terms of the contract. Because notice is the event that triggers coverage in a claims-made policy, extending the notice period effectively extends the coverage period, thereby rewriting the contract to the benefit of the insured and the detriment of the insurer. Thus,

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43. *See* Kroll, *supra* note 10, at 64.

44. *See* Kroll, *supra* note 40, at 843.

45. *See* Kroll, *supra* note 10, at 64.

46. *See* St. Paul Fire & Marine Ins. Co. v. House, 315 Md. 328, 350-51, 554 A.2d 404, 415 (1989) (Murphy, C.J., dissenting). In *House*, Judge Murphy explained:

> There are various types of policies within the claims made category. So-called "pure" claims made policies generally define "claims made" as all claims brought against the insured within the policy period. The claim made against the insured party is the event which invokes coverage. The policy may also be of a "reporting" type, defining "claims made" as all claims made against the insurer by the insured during the policy period. Thus, the claim made against the insurer is the event invoking coverage in a "reporting" type of claims made policy.

Id.

47. Hybrid policies also exist, which more closely resemble claims-made policies but also incorporate occurrence policy language and concepts. *See id.* at 351, 554 A.2d at 415 (Murphy, C.J., dissenting) (discussing hybrids in the context of scope of coverage). For example, policies with retroactive dates cover only those *claims made* within the policy period and arising from *occurrences* on or after the retroactive date. *Id.* Policies with extended reporting periods cover *claims made* within the policy period and also those resulting from *occurrences* reported during the policy period or the extended reporting period. *Id.* at 351, 554 A.2d at 415-16. Judicial interpretation of these policies with respect to notice-prejudice rules is particularly problematic. The insurance policy at issue in *T.H.E. Ins. Co.* contained both a retroactive date and an extended reporting period. To reduce complexities, the majority chose to overlook the policy's hybrid features and designate it a claims-made policy. *See T.H.E. Ins. Co.*, 331 Md. at 408, 628 A.2d at 224.

many courts have refused to apply notice-prejudice provisions to claims-made policies.[48]

In *House*, however, the Court of Special Appeals gave section 482 a plain-language reading and concluded that it applied to claims-made policies and occurrence policies alike.[49] The Court of Appeals granted certiorari to determine whether the statute indeed mandated coverage of a claim presented after the termination date of a claims-made policy,[50] but postponed resolution of the issue by construing an ambiguous policy term against the insurance company.[51] The dissent considered the policy a claims-made policy of the reporting type.[52] The dissent also addressed the issue of section 482's applicability to such a policy, and resolved it in favor of the insurer,[53] asserting that "[section] 482 is inapplicable to a 'reporting' type of claims made policy when the claim is made after the expiration of the policy."[54]

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48. *See, e.g.*, Sletten v. St. Paul Fire & Marine Ins. Co., 780 P.2d 428, 430 (Ariz. Ct. App. 1989) ("[A]pplying the late notice/prejudice rule to claims-made policies . . . would be to convert claims-made policies into occurrence policies."); Campbell & Co. v. Utica Mut. Ins. Co., 820 S.W.2d 284, 288 (Ark. Ct. App. 1991) ("To allow an extension of reporting time where the insurer failed to demonstrate prejudice in a claims-made policy would extend the coverage the parties contracted for and, in effect, rewrite the contract between the parties."); Pacific Employers Ins. Co. v. Superior Court, 270 Cal. Rptr. 779, 784 (Cal. Ct. App. 1990) (reasoning that to apply the notice-prejudice rule "would be to convert [the] claims-made policy into an occurrence policy"); Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512, 515-16 (Fla. 1983) (ruling that applying a notice-prejudice rule to a claims-made policy "in effect rewrites the contract between the two parties"); Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395, 406 (N.J. 1985) ("[A]n extension of the notice period in a 'claims made' policy constitutes an unbargained-for expansion of coverage."); Safeco Title Ins. Co. v. Gannon, 774 P.2d 30, 35 (Wash. Ct. App. 1989) ("[T]he notice-prejudice rule does not apply to the claims after [the claims-made policy's] termination clause because to do so would be to provide coverage the insurer did not intend to provide and the insured did not contract to receive.").

49. St. Paul Fire & Marine Ins. Co. v. House, 73 Md. App. 118, 133-35, 533 A.2d 301, 308-09 (1987), *aff'd on other grounds*, 315 Md. 328, 554 A.2d 404 (1989).

50. *House*, 315 Md. at 330, 554 A.2d at 405.

51. *Id.* at 333-41, 554 A.2d at 407-11. The policy required that, in order for coverage to attach, "[t]he claim must . . . first be made while this agreement is in effect." *Id.* at 334, 554 A.2d at 407. A patient injured during surgery brought suit against Dr. House during the policy period, but Dr. House did not forward the claim to St. Paul until after the policy had expired. *Id.* at 331, 554 A.2d at 405-06. Dr. House argued that the "claim" was the original complaint by the patient against the doctor. St. Paul argued that the "claim" was Dr. House's report of the patient's claim to the insurance company. The court conceded that "the policy [could] be read as St. Paul contend[ed]," but noted that it also could "just as easily be read to have afforded coverage when a claim is made, using the ordinary meaning." *Id.* at 340, 554 A.2d at 410. Finding a "genuine ambiguity," the court construed the contract against its drafter, St. Paul. *Id.* at 341, 554 A.2d at 410.

52. *Id.* at 350-52, 554 A.2d at 415-16 (Murphy, C.J., dissenting).

53. *See id.* at 355-60, 554 A.2d at 417-20 (Murphy, C.J., dissenting).

54. *Id.* at 356, 554 A.2d at 418 (Murphy, C.J., dissenting).

3. The Court's Reasoning.—The court began its analysis in *T.H.E. Insurance Co.* by identifying the parties' positions. T.H.E.'s argument hinged on its interpretation of the insurance contract,[55] whereas P.T.P. based its position on a literal reading of section 482. From the policy provisions,[56] T.H.E. argued that "[t]he outside time limit within which either the occurrence of Buckley's accident or a claim asserted by Buckley was to be reported to the insurer was not later than sixty days after the end of the policy period."[57] Because P.T.P. never reported the original occurrence, and did not even receive Buckley's claim until five days after the end of the extended reporting period, T.H.E. concluded that no coverage could attach. On the other hand, P.T.P. argued that under section 482, "any insurer" wishing to disavow coverage on the basis of late notice must prove actual prejudice.[58] It asserted that because T.H.E. failed to prove such prejudice, it could not deny coverage.[59] T.H.E. rebutted P.T.P.'s statutory literalism with a legislative intent argument that "the purpose of [section] 482 is to

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55. T.H.E. argued from the following policy provisions:

SECTION I—COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

. . . .

b. This insurance applies to 'bodily injury' and 'property damage' only if a claim for damages because of the 'bodily injury' or 'property damage' is first made against any insured during the policy period.

(1) A claim by a person or organization seeking damages will be considered to have been made when written notice of such claim is received and recorded by us . . . .

. . . .

SECTION IV—COMMERCIAL GENERAL LIABILITY CONDITIONS

. . . .

2. Duties In The Event Of Occurrence, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an 'occurrence' which may result in a claim . . . .

b. If a claim is received by any insured you must . . . see to it that we receive written notice of the claim as soon as practicable.

SECTION V—EXTENDED REPORTING PERIODS

. . . .

2. A Basic Extended Reporting Period is automatically provided without additional charge. This period starts with the end of the policy period and lasts for:

a. Five years for claims arising out of an 'occurrence' reported to us, not later than 60 days after the end of the policy period, in accordance with paragraph 2.a. of SECTION IV . . . ; or

b. Sixty days for all other claims.

T.H.E. Ins. Co., 331 Md. at 411-12, 628 A.2d at 225-26.

56. *See supra* note 55.

57. *T.H.E. Ins. Co.*, 331 Md. at 413, 628 A.2d at 226.

58. *Id.* at 413-14, 628 A.2d at 226.

59. *Id.*

prevent forfeitures of coverage that had attached and not to create coverage that never attached."[60]

The court next noted that section 482 replaced *Watson*'s condition precedent analysis[61] with a two-step breach of covenant analysis. It explained that for an insurer to deny coverage due to the insured's deficient notice, "[f]irst, there must be a specified type of breach by the insured; and second, the insurer must show the materiality of the breach by demonstrating that the lack of notice or cooperation has resulted in actual prejudice."[62] The court observed that T.H.E. did not refuse an otherwise valid claim based on P.T.P.'s breach of a policy condition or covenant of prompt notice. Instead, T.H.E. contended that by June 1988 there was no longer any policy to breach; the policy had terminated before P.T.P. ever submitted the claim invoking its coverage.[63]

The court reasoned that such a situation was beyond the purpose and ambit of section 482: "Section 482 could no more revive the original policy to cover the Buckley claim than [section] 482 could reopen an occurrence policy to embrace a claim based on an accident that happened after the end of the policy period."[64] The court carefully circumscribed its holding, however, by stating that "[i]t would be an incorrect oversimplification to express the issue here to be whether [section] 482 applies at all to claims made policies."[65] *T.H.E. Insurance Co.* established only that section 482 does not extend coverage under claims-made policies to include claims made after the policy expires.

Surveying the law in other jurisdictions that have addressed the applicability of notice-prejudice rules to claims-made policies, the court found its result in accord with "the overwhelming weight of authority, measured both numerically and by persuasiveness."[66] Arizona,[67] Arkansas,[68] California,[69] Florida,[70] Louisiana,[71] Massachu-

60. *Id.* at 414, 628 A.2d at 226.

61. *See supra* notes 33-39 and accompanying text (discussing *Watson*'s condition precedent analysis).

62. *T.H.E. Ins. Co.*, 331 Md. at 415, 628 A.2d at 227. To prove actual prejudice, an insurer must show that the insured's late notice eliminated its opportunity to defend the insured adequately. Washington v. Federal Kemper Ins. Co., 60 Md. App. 288, 296-97, 482 A.2d 503, 507, *cert. denied*, 302 Md. 288, 487 A.2d 292 (1984).

63. *T.H.E. Ins. Co.*, 331 Md. at 415, 628 A.2d at 227.

64. *Id.*

65. *Id.* at 414 n.7, 628 A.2d at 226 n.7.

66. *Id.* at 416, 628 A.2d at 228.

67. Sletten v. St. Paul Fire & Marine Ins. Co., 780 P.2d 428 (Ariz. Ct. App. 1989).

68. Campbell & Co. v. Utica Mut. Ins. Co., 820 S.W.2d 284 (Ark. Ct. App. 1991).

69. Pacific Employers Ins. Co. v. Superior Court, 270 Cal. Rptr. 779 (Cal. Ct. App. 1990).

setts,[72] Michigan,[73] Missouri,[74] New Jersey,[75] and Washington[76] courts have refused to apply notice-prejudice provisions to claims submitted after the termination of claims-made policies, as have the First,[77] Third,[78] Sixth,[79] Eighth,[80] and Ninth[81] Circuit Courts of Appeals, interpreting the state law of Rhode Island, Pennsylvania, Ohio, Minnesota, and California, respectively.

In closing, the court dismissed Atlantic and Melson's argument that the General Assembly recently evidenced its intent to apply section 482 to claims-made policies.[82] Atlantic and Melson based their contention on the Senate Finance Committee's 1988 consideration and rejection of Senate Bill 503, which would have amended section 482 to waive the actual prejudice requirement for claims-made policies.[83] The court found the legislature's failure to act on a proposed amendment an unconvincing indicator of a specific legislative intent.[84]

4. Analysis.—"Pure" and "reporting" claims-made policies are less costly than traditional occurrence coverage because they define more narrowly the insurer's period of potential liability.[85] Potential liability for an insured's negligence during an occurrence policy's effective period extends indefinitely into the future. A third party may bring a claim at any time in the future if the negligent act or omission of the insured occurred during the policy period. Inflation, escalating

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70. Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512 (Fla. 1983).

71. Jefferson Guar. Bank v. Westbank-Marrero Cab Co., 570 So. 2d 498 (La. Ct. App. 1990), *cert. denied*, 575 So. 2d 391 (La. 1991).

72. Chas. T. Main, Inc. v. Fireman's Fund Ins. Co., 551 N.E.2d 28 (Mass. 1990).

73. Stine v. Continental Casualty Co., 349 N.W.2d 127 (Mich. 1984).

74. Continental Casualty Co. v. Maxwell, 799 S.W.2d 882 (Mo. Ct. App. 1990).

75. Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395 (N.J. 1985).

76. Safeco Title Ins. Co. v. Gannon, 774 P.2d 30 (Wash. Ct. App.), *appeal denied*, 782 P.2d 1069 (Wash. 1989).

77. DiLuglio v. New England Ins. Co., 959 F.2d 355 (1st Cir. 1992).

78. City of Harrisburg v. International Surplus Lines Ins. Co., 596 F. Supp. 954 (M.D. Pa. 1984), *aff'd*, 770 F.2d 1067 (3d Cir. 1985).

79. United States v. A.C. Strip, 868 F.2d 181 (6th Cir. 1989).

80. Esmailzadeh v. Johnson & Speakman, 869 F.2d 422 (8th Cir. 1989).

81. Burns v. International Ins. Co., 929 F.2d 1422 (9th Cir. 1991).

82. *T.H.E. Ins. Co.*, 331 Md. at 421-22, 628 A.2d at 230-31.

83. Brief of Appellees Atlantic Insurance Associates and Alfred V. Melson at 8.

84. *T.H.E. Ins. Co.*, 331 Md. at 422, 628 A.2d at 231. While Senate Bill 503 was pending, the Court of Appeals granted certiorari to review the decision of the Court of Special Appeals in *House*. The legislature might have relegated settlement of the question to the judiciary by dropping the bill. Brief of *Amicus Curiae* Scottsdale Insurance Company at 4.

85. *See* Kroll, *supra* note 40, at 849; Gerald Kroll, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 UCLA L. REV. 925, 928-29 (1975) [hereinafter G. Kroll].

damage awards, and expanding notions of tort liability have rendered liability under these policies unpredictable and potentially great.[86] Insurers therefore demand compensation in the form of higher premiums for the higher risk associated with occurrence policies.

Claims-made policies, on the other hand, lack the unpredictability and attendant risk of occurrence policies.[87] The insurer is responsible only for claims submitted during the policy period. Its potential liability terminates when the policy period expires. Because claims-made policies limit the duration of the insurer's potential liability and allow more accurate actuarial calculation of risk, premiums are lower.[88]

Had the court applied section 482 to claims filed after the termination date of claims-made policies, it would have extended indefinitely the time period of potential liability for claims-made policy issuers in Maryland. The likely result would have been eventual elimination of the claims-made form of liability coverage from the Maryland insurance market.[89] Indefinite extension of the insurer's period of risk would have prompted insurers to raise premiums or discontinue the claims-made form of coverage altogether, as it would have become essentially duplicative of occurrence coverage. Potential policyholders would have lost a cost-effective alternative to occurrence coverage and perhaps the possibility of obtaining affordable insurance at all.[90]

T.H.E. Insurance Co., however, was not an unqualified boon to either insurers or insureds. It addressed only one factual situation under a rather ambiguous policy,[91] leaving important issues unresolved. Variations in factual sequence, or in policy language and

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86. Parker, *supra* note 40, at 71; Kroll, *supra* note 40, at 846-47; G. Kroll, *supra* note 85, at 928.

87. *See* G. Kroll, *supra* note 85, at 928.

88. *Id.* at 929.

89. Appellees P.T.P., Atlantic, and Melson argued that applying section 482 to claims-made policies would have produced no dire effects on the insurance market. They pointed to the continuing issuance of claims-made policies in Maryland after the decision of the Court of Special Appeals in *House*, which subjected claims-made policies to the operation of section 482. Brief of Appellee and Cross-Appellant at 17; Brief of Appellees Atlantic Insurance Associates and Alfred V. Melson at 14-15. However, the Court of Appeals's affirmation of *House* on other grounds, which postponed definitive resolution of section 482's applicability to claims-made policies, and Chief Judge Murphy's powerful dissent, probably induced a wary, wait-and-see willingness by insurers to issue new claims-made liability policies. Brief of *Amicus Curiae* Scottsdale Insurance Company at 3.

90. For example, P.T.P. was unable to obtain affordable coverage for its waterslide attraction until it located and accepted T.H.E.'s claims-made policy. Brief of Appellant at 2.

91. The court's analysis proceeded on the assumption that the policy was a claims-made policy. The dissent, however, interpreted the policy as a hybrid with significant oc-

interpretation, could yield quite different conclusions as to the applicability of section 482 in future disputes concerning claims-made or hybrid policies.

There are four temporal variables in late claim suits involving claims-made and hybrid policies: the date of the initial occurrence, the date the insured notifies the insurer of the occurrence, the date the injured party presents a claim against the insured, and the date the insured reports the claim to the insurer. *T.H.E. Insurance Co.* presented the factual scenario most favorable to the court's conclusion that section 482 did not apply; the accident occurred after the retroactive date, and neither the insured's report of the occurrence, nor the injured party's claim against the insured, nor the insured's report of the claim to the insurer, took place within the policy period.

Section 482's inapplicability to other factual configurations is less certain. The court acknowledged that section 482 could apply to a claims-made policy similar to the one at issue in *T.H.E. Insurance Co.* if the insured's report of the original occurrence were late or nonexistent, but the injured party's claim and the insured's report to its insurer took place within the policy period.[92] In such a case, the insurer attempting to disclaim coverage would have to prove actual prejudice from inadequate notice of the original event.[93]

Further, if the insured's report of the occurrence took place before the policy's termination, but the injured person's claim and the insured's referral of that claim did not, coverage likely would hinge on whether the policy featured an extended coverage period for timely-reported occurrences. If so, the insured would not need to invoke section 482 to secure coverage if the injured person's claim or the insured's report to the insurer or both took place within the extended coverage period. If not, section 482 would not apply, as this would convert the claims-made policy into an occurrence policy by extending the contractual coverage period.

Finally, if the insured's report of the occurrence and the injured party's claim took place before the policy's termination, but the insured's report of the claim to the insurer did not, coverage likely would hinge on whether the claims-made policy was of the pure or reporting type.[94] Again, the court's interpretation of the policy language would be dispositive. Section 482 would be unnecessary to se-

currence elements. *T.H.E. Ins. Co.*, 331 Md. at 426-27, 628 A.2d at 233 (Eldridge, J., dissenting).

92. *Id.* at 414 n.7, 628 A.2d at 226 n.7.

93. *Id.*

94. *See supra* notes 45-47 and accompanying text.

cure coverage under a pure claims-made policy and unable to extend coverage of a reporting claims-made policy.

The essential nontemporal variable in coverage disputes over claims-made policies is the policy's definition of key terms. The dissent's objection in *T.H.E. Insurance Co.* to the majority's acceptance of the T.H.E. policy's dual definition of "claim" illustrates the importance of this variable.[95] Section I.A.1.b(1) of the policy stated: "A claim by a person or organization seeking damages will be considered to have been made when written notice of such claim is received and recorded by us . . . ."[96] The majority accepted T.H.E.'s assertion that the word "claim" encompassed both the victim's claim to the insured and the insured's report to the insurer and that both must have taken place within the policy period for coverage to attach.[97] By accepting a dual definition of "claim," the court recognized the reporting type of claims-made policy.

The dissent, however, asserted that the standard meaning of "claim made" is the injured person's claim against the insured, and that the T.H.E. policy's definition was "contorted."[98] The dissent insisted that inserting the insured's report to the insurer into the definition of "claim" reintroduced the *Watson* notion of timely notice to the insurer as a condition precedent to coverage.[99] The dissent's concern was exaggerated, however, because a de facto return to the severity of *Watson* is unlikely. Insureds, excusably unaware of the legal resonance of the undefined term "condition precedent" attached to presection 482 prompt notice provisions, could not justifiably claim ignorance of the meaning or meanings of "claim" if clearly defined in a policy. Moreover, any ambiguity of definition would be construed against the insurer who drafted the contract and in favor of the insured.[100]

The dissent raised an additional definitional issue with respect to the term "occurrence." The dissent asserted that, under the majority's rationale, an insurer could also redefine "occurrence" to mean notice to the insurer of the event, thus effectively removing occurrence poli-

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95. *T.H.E. Ins. Co.*, 331 Md. at 423-25, 628 A.2d at 231-32 (Eldridge, J., dissenting).

96. *Id.* at 411-12, 628 A.2d at 225.

97. *Id.* at 413, 628 A.2d at 226.

98. *Id.* at 426, 628 A.2d at 233 (Eldridge, J., dissenting).

99. *Id.* at 425-26, 628 A.2d at 232-33 (Eldridge, J., dissenting).

100. *See* Mutual Fire, Marine & Inland Ins. Co. v. Vollmer, 306 Md. 243, 251, 508 A.2d 130, 134 (1986) ("[T]he rule . . . is to resolve ambiguity against the drafter of the policy and in favor of coverage."); Government Employees Ins. Co. v. DeJames, 256 Md. 717, 720, 261 A.2d 747, 749 (1970) ("[A]mbiguity is to be resolved against the company which prepared the policy and in favor of the insured.") (citations omitted).

cies from the reach of section 482.[101] Revising the uniformly recognized definition of "occurrence" to the detriment of insureds, however, would violate not only the protective intent of the notice-prejudice statute but also the public policy of ensuring availability of adequate coverage.[102] A redefinition of "occurrence," therefore, also would be unlikely to withstand judicial scrutiny.

Although the majority defined the T.H.E. policy as a claims-made policy, the dissent characterized the policy as a hybrid based on the "occurrence" language in the Basic Extended Reporting Period provision, which confirmed coverage for "[f]ive years for claims arising out of an 'occurrence' reported to us, not later than 60 days after the end of the policy period."[103] Had P.T.P. filed notice of the August 27, 1987, "occurrence" on or before the last day of the extended reporting period, coverage would have attached for related claims arising within the next five years. Therefore, the dissent contended, P.T.P. suffered exactly the sort of unjustifiable forfeiture for late notice that section 482 was intended to prevent.[104]

The purpose of providing extended reporting periods, however, is merely to allow insureds administrative breathing room to report errors and omissions occurring late in the policy period. Applying section 482 to their occurrence language would indefinitely expand the extended reporting period and the insurer's potential liability. The likely result would be removal of these provisions, which are essentially protective of policyholders, from claims-made insurance contracts. Perversely, the application of the notice-prejudice statute in this situation would operate, in direct contravention of the legislature's intent, to the detriment of insureds. Finally, section 482 does not apply to denials of coverage based on the insured's failure to submit notice of loss within a policy-specified time limit.[105] Therefore,

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101. *T.H.E. Ins. Co.*, 331 Md. at 426, 628 A.2d at 233 (Eldridge, J., dissenting). The dissent asserted that "[u]nder such a policy and the majority's rationale, if there were no notice to the insurer during the policy period, there would be no occurrence for purposes of coverage and thus no disclaimer of coverage within the meaning of § 482." *Id.* (Eldridge, J., dissenting).

102. *See Vollmer*, 306 Md. at 250, 508 A.2d at 133 (noting that literal application of contract terms is the principle of construction in Maryland "*[u]nless* a statute, regulation, or public policy would be violated") (emphasis added).

103. *T.H.E. Ins. Co.*, 331 Md. at 427, 628 A.2d at 233 (Eldridge, J., dissenting).

104. *Id.* at 428, 628 A.2d at 233 (Eldridge, J., dissenting).

105. Government Employees Ins. Co. v. Harvey, 278 Md. 548, 551, 366 A.2d 13, 17 (1976) ("We think it clear from the history and language of § 482 that its provisions do not apply to insurance disclaimers grounded on the insured's failure to submit proof of loss *within the time specified in the policy.*") (emphasis added).

extended reporting periods of policy-specified duration are both valid and exempt from the operation of section 482.

5. Conclusion.—Although the Court of Appeals restricted the application of a statute enacted to protect insureds in *T.H.E. Insurance Co.*, its decision ultimately will benefit both consumers and suppliers of liability insurance by preserving the viability of claims-made and hybrid coverage. These less costly alternatives to traditional occurrence policies provide increasingly necessary diversity and accessibility of coverage in the commercial liability insurance market. The court's careful limitation of its holding to preserve section 482's potential applicability to claims-made and hybrid policies in other factual circumstances further safeguarded the interests of policyholders. The court's tolerance of T.H.E.'s dual definition of a key policy term implicitly preserved the right of insurers to continue experimental policy drafting, within limits imposed by precedent. By carefully confining itself to the facts before it, the court skirted provocative issues that are unlikely to escape litigation in the long term. In the short term, however, the court prudently interpreted section 482 in the manner best calculated to protect the legitimate economic interests of both insurers and insureds.

KATHLEEN E. WHERTHEY

XI. PROFESSIONAL CONDUCT

A. Narrowing the Scope of the Rule of Confidentiality

In *Harris v. Baltimore Sun Co.*,[1] the Court of Appeals held that some potential for harm to a client's interests must exist before an attorney will be considered to have breached rule 1.6 of the Maryland Lawyers' Rules of Professional Conduct[2] for having revealed "information relating to the representation of a client."[3] The *Harris* court also clarified the relationship between the Maryland Public Information Act (MPIA)[4] and rule 1.6, finding that the MPIA requires the release of public record-client information that is not otherwise privileged, unless such disclosure can be shown to be potentially harmful to the client's interests.[5] The *Harris* court essentially rewrote the standard of

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1. 330 Md. 595, 625 A.2d 941 (1993).

2. *See* MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993). Rule 1.6 (Confidentiality of Information) provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another;
>
> (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceedings concerning the lawyer's representation of the client.
>
> (4) to comply with these Rules, a court order, or other law.

Id.

3. *Harris*, 330 Md. at 608, 625 A.2d at 947.

4. MD. CODE ANN., STATE GOV'T §§ 10-611 to -628 (1993). Section 10-612 of the Act provides:

> (a) General right to information.—All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.
>
> (b) General construction.—To carry out the right set forth in subsection (a) of this section, unless an unwarranted invasion of the privacy of a person in interest would result, this Part III of this subtitle shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests inspection.

Id. § 10-612.

5. *Harris*, 330 Md. at 604, 608, 625 A.2d at 945, 947.

confidentiality for all attorneys in Maryland, but its decision will have the greatest impact on public agencies subject to the MPIA. In the future, such agencies will bear the burden of showing "potential for harm" to a client's interests before they may deny public access to the client's legal records.

1. The Case.—In February 1992, in the aftermath of the highly publicized capital murder trial of John Frederick Thanos, The Baltimore Sun Company (The Sun) directed a request to the Office of the Public Defender (OPD) seeking records of the costs associated with Thanos's defense.[6] The Sun made the request pursuant to the MPIA and asked for documentation of the expenses incurred by OPD attorneys defending Thanos and of the fees and expenses paid to four expert witnesses who testified on Thanos's behalf.[7]

OPD denied The Sun's request, asserting that the records were privileged and their "disclosure would be contrary to the best interest of Mr. Thanos."[8] The Sun then sued in the Circuit Court for Baltimore City for the release of the expense records.[9] The complaint named as defendant Stephen E. Harris, the Public Defender for the State of Maryland and the official custodian of the records.[10]

After considering the opposing motions for summary judgment and hearing oral arguments, the circuit court ordered OPD to produce the documents requested by The Sun.[11] In a lengthy and detailed memorandum opinion, the court sought, *inter alia*, "to evaluate the boundaries between the exercise of two competing fundamental rights"[12]—the First Amendment right of a newspaper to access public documents and the Sixth Amendment right of a defendant to the effective assistance of counsel, which includes protection of the confidentiality of the attorney-client relationship.[13] Finding that Thanos's representation on appeal would not be "affected in any material man-

6. *Id.* at 598-99, 625 A.2d at 942.

7. *Id.* at 599, 625 A.2d at 942.

8. Appellant's Brief at E.8 (quoting Letter from Ronald A. Karasic, Deputy Public Defender, to Glenn Small, Jr., *The Baltimore Sun* (Mar. 4, 1992)).

9. *Harris*, 330 Md. at 599, 625 A.2d at 942.

10. *Id.*, 625 A.2d at 942-43.

11. *Id.*, 625 A.2d at 943.

12. Baltimore Sun Co. v. Harris, No. 92-100026, slip op. at 9-10 (Cir. Ct. Balt. City July 14, 1992).

13. *Id.* at 10-12.

ner by this disclosure,"[14] the circuit court ruled that, in this case, "the First Amendment right of access prevail[ed]."[15]

OPD appealed the ruling to the Court of Special Appeals,[16] maintaining that its attorneys were governed by the same rules of professional conduct as private attorneys and that its clients were owed the same duty of protection of confidentiality as clients of privately retained lawyers.[17] OPD argued that, had the circuit court correctly applied rule 1.6, it would have found the requested documents to be confidential information "relating to the representation of a client."[18] As such, they would be protected from disclosure under the required denial provisions of section 10-615 of the MPIA.[19]

Before the Court of Special Appeals could hear the case, the Court of Appeals issued a writ of certiorari on its own motion to hear the case.[20]

2. Legal Background.—The Maryland Lawyers' Rules of Professional Conduct have been in effect only seven years,[21] and the Court of Appeals has had little occasion to determine the full scope of rule 1.6. When adopted, the phrase "information relating to representation of a client" was understood to significantly broaden the scope of

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14. *Id.* at 33.

15. *Id.* at 42. In reaching this decision, the circuit court used a balancing test set forth by the Court of Appeals for the Fourth Circuit in Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989). *Harris*, No. 92-100026, slip op. at 42.

16. *Harris*, 330 Md. at 599, 625 A.2d at 943.

17. Appellant's Brief at 5-18.

18. *Id.* at 17.

19. *Id.* at 8. Section 10-615 of the State Government Article provides in pertinent part that "[a] custodian shall deny inspection of a public record or any part of a public record if: (1) by law, the public record is privileged or confidential; or (2) the inspection would be contrary to . . . the rules adopted by the Court of Appeals . . . ." MD. CODE ANN., STATE GOV'T § 10-615 (1993).

20. *See Harris*, 330 Md. at 599, 625 A.2d at 943. At this time, the Sun appealed the circuit court's denial of attorneys fees. *Id.* at 611, 625 A.2d at 948. The circuit court refused to award attorney's fees because it found OPD's defense "far from frivolous." Baltimore Sun Co. v. Harris, No. 92-100026, slip op. at 43 (Cir. Ct. Balt. City July 14, 1992). Arguing that it had "substantially prevailed" in the circuit court, it asserted that it was entitled to such reimbursement under the MPIA. Appellee's Brief at 16-20. Section 10-623(f) of the MPIA provides that "[i]f the court determines that the complainant has substantially prevailed, the court may assess against a defendant governmental unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred." *See* MD. CODE ANN., STATE GOV'T § 10-623(f) (1993). Because the Court of Appeals vacated the judgment of the lower court, it found the issue "premature" and declined to consider the cross-appeal. *Harris*, 330 Md. at 611, 625 A.2d at 948.

21. The Court of Appeals adopted the rules, which are based on the ABA Model Rules of Professional Conduct, on April 15, 1986. 13 Md. Reg. 3 (May 23, 1986). They went into effect on January 1, 1987. *Id.*

rule 1.6's predecessor under the Code of Professional Responsibility.[22] Because this change was overshadowed by the intense debate regarding the exceptions to rule 1.6, however, the question of the rule's outermost boundaries received little attention.[23]

Prior to *Harris*, the Court of Appeals had never considered the relationship between the confidentiality provisions of rule 1.6 and the disclosure requirements of the MPIA. The MPIA clearly states, however, that its provisions "shall be construed in favor of permitting inspection of a public record, with the least cost and least delay."[24] Affirming this principle, the Court of Appeals had consistently held that "the legislative intent [of the MPIA was to ensure] that citizens of the State of Maryland [were] accorded wide-ranging access to public information concerning the operation of their government."[25] The MPIA grants no specific exemption for client records of the Public Defender, and the Public Defender enabling statute does not state that such records are by definition confidential.[26] Any protection of OPD client records, therefore, depends on the general exemptions specified in the MPIA and the confidentiality provisions of rule 1.6.

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22. *Harris*, 330 Md. at 612-14, 625 A.2d at 949-50 (Chasanow, J., dissenting). Disciplinary Rule (DR) 4-101 of the Code of Professional Responsibility only protected client "confidences" and "secrets," which it defined as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

2 MD. RULES 460 (1986) (repealed 1987).

23. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODERN RULES OF PROFESSIONAL CONDUCT § 1.6:101-102 (2d ed. Supp. 1991). According to Hazard and Hodes, the disclosure provisions of rule 1.6

> were attacked from both sides of a spectrum of concern about lawyer confidentiality. Some objected that Rule 1.6 would permit or require *too much* disclosure, and painted frightening pictures of lawyers falling over each other in a mad dash to 'blow the whistle' on their clients. Others objected that the Model Rules provided for *not enough* disclosure, allowing lawyers to help their clients cover up wrongdoing.

Id. § 1.6:10, at 127. In adopting the Rules, the Court of Appeals chose to broaden the permissible exceptions to confidentiality by adding subparagraphs (b)(2) and (b)(4) to rule 1.6. *See supra* note 2. These exceptions had been part of the original proposal by the Kutak Commission, which drafted the Rules, but had been rejected by the ABA House of Delegates. HAZARD & HODES, *supra*, § 1.06:109, at 143.

24. MD. CODE ANN., STATE GOV'T § 10-612(b) (1993).

25. A.S. Abell Publishing Co. v. Mezzanote, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983); *see also* Cranford v. Montgomery County, 300 Md. 759, 771, 481 A.2d 221, 227 (1984) (stating that "[t]he custodian who withholds public documents carries the burden of justifying nondisclosure").

26. *See* MD. ANN. CODE art. 27A (1990).

Maryland courts that have considered the degree of confidentiality afforded attorney fee information have ruled expressly that such information is not protected by the attorney-client privilege.[27] No court has determined whether such information falls within the broader scope of confidential client information, however. *Harris* was in this respect a case of first impression in Maryland.

Like in Maryland, there is little case law regarding the scope of rule 1.6 in other states that have adopted the Model Rules of Professional Conduct.[28] Maryland's position on the confidentiality of fee information, however, is consistent with that taken by the federal circuits. It is well established among federal courts that information regarding attorney's fees is not protected by the attorney-client privilege.[29] For example, in *United States v. Suarez*,[30] the Court of Ap-

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27. *See In re* Criminal Investigation No. 1/242Q, 326 Md. 1, 602 A.2d 1220 (1992). In this case, the court held that a grand jury subpoena for attorney fee information must be obeyed because "payment of a fee [is] a nonassertive act . . . not intended to communicate information" and, therefore, is not protected by the attorney-client privilege. *Id.* at 10, 602 A.2d at 1224. The court discussed whether rule 1.6 applied in the case and held that it did not, because subsection (b)(4) requires that attorneys reveal information "to comply with . . . other law." *Id.* at 4-5, 602 A.2d at 1222. The court explained that "[r]ule 1.6 applies to confidential communications between a client and an attorney in all situations *except* where the 'evidence is sought from the lawyer through compulsion of law.' In the latter situation, only the attorney-client privilege . . . protects against disclosure." *Id.* at 5, 602 A.2d at 1222. Given that rule 1.6 was held inapplicable, the court never determined whether fee information is confidential under the rule.

See also Moberly v. Herboldsheimer, 276 Md. 211, 345 A.2d 855 (1975). In *Moberly*, the court considered whether, pursuant to a public information request, a municipal hospital must release information concerning the fees it paid to its attorneys. *Id.* at 213, 345 A.2d at 856. Examining only the question of attorney-client privilege, the court concluded that the fee information must be released because "'[t]he communication by the client to the attorney is privileged, not the fee which the lawyer charges the client.'" *Id.* at 226, 345 A.2d at 863. In *Moberly*, there was no need to examine the attorney's duty of confidentiality because "the request was directed to the client, not to the attorney." *Harris*, 330 Md. at 601, 625 A.2d at 944.

28. Thirty-four states and the District of Columbia have adopted the Model Rules. A number of the larger states, among them New York, Massachusetts, and Virginia, continue to operate under the Code of Professional Responsibility, with its narrow provisions for confidentiality. HAZARD & HODES, *supra* note 23, app. § 4:101, at 1255. For a contrary position to that taken by Maryland, see *In re* Advisory Opinion No. 544 of N.J., 511 A.2d 609 (N.J. 1986). In that case, the New Jersey Supreme Court considered whether a legal services organization, the Community Health Law Project, could be compelled to provide the identities of its clients to the agencies from which it received funding. The court answered this question in the negative, stating that "a client's identity constitutes information relating to the representation of a client under the current Rules of Professional Conduct and is a secret entitled to nondisclosure." *Id.* at 614.

29. *See, e.g., In re* Grand Jury Matter, 926 F.2d 348, 351 (4th Cir. 1991) (stating that "'[the] attorney-client privilege normally does not extend to the payment of attorney's fees and expenses'") (citation omitted); *In re* Grand Jury Proceedings 88-89 (MIA), 899 F.2d 1039, 1044 (11th Cir. 1990) (holding that attorney fee information is not privileged unless

peals for the Second Circuit considered whether there is a broader, Sixth Amendment protection of fee information. In *Suarez*, the *Hartford Courant* newspaper successfully petitioned the federal district court for defense cost documents,[31] and the defendant's court-appointed counsel appealed.[32] The determinative issue in the case was whether release of the cost information would in any way be prejudicial to the defendant.[33] Finding that the newspaper had a "qualified First Amendment right of access" to documents submitted in connection with a criminal proceeding[34] and perceiving no violation of appellants' Sixth Amendment right to effective assistance of counsel or the attorney-client privilege,[35] the Second Circuit affirmed the decision to release the defense cost documents.[36]

3. The Court's Reasoning.—In *Harris*, the court began its analysis by acknowledging that "the requested records [were] public records within the [MPIA]."[37] The court also affirmed that OPD attorneys owe their clients the "same duty to maintain confidentiality of information that all lawyers owe to their clients under [rule] 1.6."[38] The issue was whether, as The Sun argued, the MPIA constitutes "compulsion of law" sufficient to overcome the rule of confidentiality.[39] Focusing on the limiting effect of section 10-615(1) of the MPIA, which exempts records which, "by law, [are]. . . privileged or confidential,"[40] the court concluded that the MPIA does not override rule 1.6 because, "[u]nlike

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its disclosure will reveal other, privileged information); *In re* Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983) ("Fee arrangements usually fall outside the scope of the privilege simply because such information ordinarily reveals no confidential professional communication between attorney and client . . . .").

30. 880 F.2d 626 (2d Cir. 1989).

31. *Id.* at 628.

32. *Id.*

33. *See id.* at 631-33. Because the documents were in the custody of the clerk of the court rather than defense counsel, the attorney's duty of confidentiality to the client was not an issue in *Suarez*. *See id.* at 628.

34. *Id.* at 631.

35. *Id.*

36. *Id.* at 633.

37. *Harris*, 330 Md. at 599, 625 A.2d at 943; *see* MD. CODE ANN., STATE GOV'T § 10-611 (1993) (defining "public record").

38. *Harris*, 330 Md. at 600, 625 A.2d at 943; *see* Polk County v. Dodson, 454 U.S. 312, 318 (1991) (stating that "'[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program'") (quoting AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE 4-3.9 (2d ed. 1980)).

39. *Harris*, 330 Md. at 601, 625 A.2d at 943.

40. MD. CODE ANN., STATE GOV'T § 10-615 (1993).

the compulsion of a grand jury subpoena, there is no compulsion under the Act if the public record is confidential."[41]

While acknowledging that the exception provisions of section 10-615(1) shield *confidential* records from disclosure, the court refused to read rule 1.6 as justifying the "[denial of] all requests for production of public record-client information."[42] Such a blanket exclusion, the court reasoned, would be "contrary to the Act's policy that '[a]ll persons are entitled to have access to information about the affairs of government . . . .'"[43] The court concluded that "[the MPIA], in relation to [rule] 1.6(a), . . . impos[es] an objective, affirmative standard. The lawyer-custodian of public record-client information must disclose requested information unless, by disclosing, the lawyer would violate [rule] 1.6(a) and thereby be exposed to professional discipline."[44]

Having established these basic principles, the court turned to an examination of the meaning of rule 1.6(a), particularly the scope of the phrase "information relating to representation of a client."[45] Comparing rule 1.6 to its predecessor under the Code of Professional Responsibility,[46] the court noted the broader zone of confidentiality created by the new rule.[47] It also pointed out, however, that scholarly commentary has questioned whether rule 1.6 was intended to be read literally.[48] To apply the rule literally would be to hold that a lawyer who tells his spouse that he "must travel to a distant city overnight to argue a case for an identified client" has violated rule 1.6.[49] According to the court, such a prohibition would be "senseless, . . . and, by

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41. *Harris*, 330 Md. at 603, 625 A.2d at 944.

42. *Id.* at 604, 625 A.2d 945.

43. *Id.* (quoting MD. CODE ANN., STATE GOV'T § 10-612(a) (1993)).

44. *Id.*

45. *Id.* at 605, 625 A.2d at 945.

46. *See supra* note 22.

47. *Harris*, 330 Md. at 606, 625 A.2d 946. Quoting Professor Wolfram, the court explained that "'[t]he definition in MR 1.6 transcends the Code . . . (1) it includes all information regardless of when it was learned by the lawyer; [and] (2) it includes information without regard to whether disclosure would embarrass or work to the detriment of a client . . . .'" *Id.* (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.2, at 298 (1986)).

48. *Id.* at 606-08, 625 A.2d at 946-47. The court quoted Professor Hazard, former reporter for the American Bar Association's Kutak Commission that drafted the Model Rules, who noted that "'read literally and in isolation, the rule is so stringent as to approach the unworkable and the unrealistic.'" *Id.* at 606, 625 A.2d at 946 (quoting HAZARD & HODES, *supra* note 23, § 1.6:201, at 158). The court also quoted Professor Wolfram's conclusion that "it is hardly imaginable that [rule] 1.6 should be read literally to prohibit a lawyer from revealing absolutely any information about a client except in the limited exceptions explicitly provided in the rule." *Id.* at 607, 625 A.2d at 946-47 (quoting WOLFRAM, *supra* note 47, at 301).

49. *Id.*, 625 A.2d at 947 (quoting WOLFRAM, *supra* note 47, at 301).

trivializing it, would detract from the soundness of the confidentiality principle."[50] Instead, the court concluded that "[t]here must be the potential for some harm to the client's interest before an attorney will be considered to have violated the prohibition of [rule] 1.6(a) and to be subject to discipline, for having revealed 'information relating to representation of a client.'"[51] The court ruled that this determination depends "on the facts and circumstances of the particular case."[52]

Although the circuit court had conducted a lengthy analysis of whether the release of the cost information would in any way violate Thanos's Sixth Amendment right to the effective assistance of counsel,[53] the Court of Appeals held that this was not "the confidentiality analysis required under § 10-615 of the Act."[54] Therefore, the court remanded the case for a determination of whether disclosure of the records would harm Thanos's interests.[55]

In his dissenting opinion, Judge Chasanow asserted that the majority decision "all but repealed Rule 1.6."[56] He argued that the comment adopted in conjunction with rule 1.6 indicated that the rule should be read literally,[57] and that by weakening the rule of confidentiality, the majority undermined the attorney-client relationship.[58] Furthermore, he asserted that the new rule will cause "serious interpretive problems" as future courts attempt to give meaning to the term "potential for some harm to the client's interest."[59]

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50. *Id.* at 607-08, 625 A.2d at 947 (quoting WOLFRAM, *supra* note 47, at 301).

51. *Id.* at 608, 625 A.2d at 947.

52. *Id.* at 609, 625 A.2d at 947.

53. *See id.* at 609-10, 625 A.2d at 948.

54. *Id.* at 610, 625 A.2d at 948.

55. *Id.* at 610-11, 625 A.2d at 948. The Court of Appeals made two "observations" for the guidance of the circuit court. First, the court drew attention to the decision of the Court of Appeals for the Second Circuit in United States v. Suarez, 880 F.2d 626 (2d Cir. 1989), and specifically its statement that "'[w]e do not believe that disclosure of the amounts paid to attorneys and experts on appellants' behalf, or the identity of those who received them, impinges on appellants' rights.'" *Harris*, 330 Md. at 610, 625 A.2d at 948 (quoting *Suarez*, 880 F.2d at 631). Second, the court observed that "the setting aside of judgments is not unknown" on collateral review and warned that the fact that Thanos's trial had concluded and his sentence had been affirmed "does not preclude, as a matter of law, potential harm to Thanos's interests by a disclosure of the requested information to a newspaper." *Id.* at 611, 625 A.2d at 948.

56. *Harris*, 330 Md. at 612, 625 A.2d at 949 (Chasanow, J., dissenting).

57. *Id.* at 613-14, 625 A.2d at 949-50 (Chasanow, J., dissenting). The comment states that "the confidentiality requirement applies to all information about a client 'relating to the representation'. . . . It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental." MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1993).

58. *Harris*, 330 Md. at 612, 625 A.2d at 949 (Chasanow, J., dissenting).

59. *Id.* at 618, 625 A.2d at 952 (Chasanow, J., dissenting).

4. Analysis.—In *Harris*, the Court of Appeals essentially rewrote rule 1.6 of the Rules of Professional Conduct. This change will significantly affect public agencies that maintain client records subject to request under the MPIA. The effect on private attorneys, in contrast, will probably not be great in practical terms.

As a result of the court's holding in *Harris*, rule 1.6(a) in practice will effectively read as follows:

> A lawyer shall not reveal information relating to representation of a client, *which risks some potential for harm to a client's interest,* unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) of rule 1.6.[60]

This revised version of the rule represents a shift back toward rule 1.6's predecessor, Disciplinary Rule (DR) 4-101 of the Code of Professional Responsibility, which focused on whether disclosure "would be embarrassing or would be likely to be detrimental to the client."[61] Moreover, the *Harris* court's interpretation of the Rule nullified one of the major innovations intended under rule 1.6—that lawyers would no longer be permitted "to speculate whether particular information might be embarrassing or detrimental."[62]

In its interpretation of rule 1.6, the court went beyond the position suggested by Professors Hazard and Hodes, that "the line between permissible and impermissible disclosure should probably be drawn at the point of [client] anonymity."[63] Such an approach, while allowing for some flexibility in an otherwise rigid rule, could "be harmonized with the strict language of rule 1.6(a), for it may plausibly be said that when a lawyer discusses a case in strictly hypothetical or abstract terms, she is not disclosing 'information' relating to a real 'client.'"[64] Professor Hazard's suggestion was of no help to the *Harris* court, however, because the identity of the client in the case was already known.[65] Therefore, the court adopted Professor Wolfram's

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60. For the original text of the rule, see *supra* note 2.

61. MD. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1986) (repealed 1987). The *Harris* court declined to address potential client "embarrassment" under rule 1.6. *See Harris*, 330 Md. at 605-08, 625 A.2d at 945-47. The omission seems to have been deliberate, possibly because the court believed "embarrassment" to be too subjective a standard.

62. MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1993).

63. HAZARD & HODES, *supra* note 23, § 1.6:202, at 160.

64. *Id.*

65. *See Harris*, 330 Md. at 607, 625 A.2d at 946.

view instead, drawing the line of impermissible disclosure at the point where there is "some risk of harm to the client."[66]

The *Harris* court did not address the issue of whether the explicit request of a client to maintain a confidence would make information confidential regardless of whether its disclosure reasonably appeared to risk potential harm to the client's interests. Under DR 4-101, such a client request created a protected "secret,"[67] but the broader language of rule 1.6 created a presumption of confidentiality that rendered such a provision unnecessary.[68] The *Harris* court clearly stated, however, that the presumption of confidentiality must yield to the MPIA.[69] It seems that after *Harris*, therefore, such a client request, without a showing of potential harm to the client's interests by disclosure, will no longer suffice to protect information from release under the MPIA.[70] Since such information would have been protected from disclosure under DR 4-101, the court's decision seems to contradict the intent of the drafters of rule 1.6 to expand the zone of protected client information.[71]

The *Harris* decision will significantly affect all organizations subject to the MPIA that provide some form of legal services to clients.[72] As a result of the court's ruling, requests for client information under the MPIA can be denied only if the information falls within one of the exempted categories in the Act,[73] or if the agency can prove that release of the information would be potentially harmful to the client's interests.[74] Given the presumption in favor of the release of informa-

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66. *Id.* at 608, 625 A.2d at 947.

67. *See supra* note 22.

68. HAZARD & HODES, *supra* note 23, § 1.6:201, at 158. Hazard and Hodes explained that "[r]ule 1.6(a) creates a genuine presumption of confidentiality. It operates automatically, in all cases, without any signal from the client . . . ." *Id.*

69. *See Harris*, 330 Md. at 604, 625 A.2d at 945.

70. To allow otherwise would permit the OPD to evade the reach of the MPIA simply by having its clients sign a statement requesting that all information relating to their representation be kept confidential, without regard to any potential for harm from disclosure. This would be contrary to the intent of the court in *Harris*.

71. *See* HAZARD & HODES, *supra* note 23, § 1.6:210, at 158.

72. The Maryland Legal Services Corporation is exempt from the provisions of the MPIA by virtue of its enabling statute, which declares that "[e]xcept as otherwise provided in this subtitle, the Corporation is not a department, agency or instrumentality of the State." MD. ANN. CODE art. 10, § 45D(d) (1993). Additionally, many legal services organizations that receive public funding, such as the Legal Aid Bureau, are private, nonprofit organizations not subject to the MPIA. *See* MD. CODE ANN., STATE GOV'T § 10-611 (1993); *see also* Constitution and By-laws of the Legal Aid Bureau, Inc. (as amended Mar. 23, 1983) (on file at the Central Office of the Maryland Legal Aid Bureau).

73. *See* Md. Code Ann., State Gov't §§ 10-615 to -618 (1993).

74. *Harris*, 330 Md. at 609-10, 625 A.2d at 948.

tion,[75] the burden is upon agency records custodians to prove such harm. As Judge Chasanow pointed out, however, the court has left unclear the "degree of risk or potential for harm [to the client]" that is required under the new test and whether the test is to be applied subjectively or objectively.[76]

The provision in the MPIA allowing for the assessment of fees against governmental agencies if the plaintiff "substantially prevails" in court[77] may present a further dilemma for custodians of public record-client information. Out of respect for the client's interests, as well as to avoid the risk of a law suit by the client if the disclosure turns out to be harmful, the custodian should refuse to release client information if there is any doubt as to its potential for harm.[78] If the trial court takes a different view, however, the custodian's "prudence" might be rewarded by the imposition of attorney's fees.

In contrast to the situation faced by public agency lawyers, the impact on private attorneys by the new interpretation of rule 1.6 probably will be minimal. As they are not subject to the MPIA, private attorneys are spared the difficulties that the Act creates for OPD attorneys. Although the *Harris* court qualified rule 1.6 by inserting the potential for harm requirement, it said nothing to reverse the presumption of confidentiality in the private attorney-client context. Moreover, the Rules of Professional Conduct provide only the "basis for invoking the disciplinary process," and are "not designed to be a basis for civil liability."[79] Thus, the new meaning of rule 1.6 should not have any effect on civil malpractice litigation for violations of confidentiality.[80]

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75. *See* MD. CODE ANN., STATE GOV'T § 10-612 (1993).

76. *Harris*, 330 Md. at 618, 625 A.2d at 952 (Chasanow, J., dissenting).

77. MD. CODE ANN., STATE GOV'T § 10-623(f) (1993).

78. The custodian can attempt to contact the client and gain consent for release, but this may not always be feasible. Additionally, if a client refuses to consent to the release of the records, there arises the question of whether nonconsent would override the mandate of the MPIA, in the absence of a showing of harm. In an effort to reduce some of these difficulties for records custodians at public defenders' offices, some states have explicitly exempted OPD client information from the reach of their respective public information acts. *See, e.g.*, MO. ANN. STAT. § 600.091 (Vernon Supp. 1992) (providing that "[t]he files maintained by the state public defender office which relate to the handling of any case shall be considered confidential"); OHIO REV. CODE ANN. § 149.43(A)(4) (Anderson 1990) (exempting from the public information act "any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding"). This is an option for the Maryland legislature if it wishes to spare OPD from the potential dilemmas it will face as a result of the court's decision in *Harris*.

79. MD. RULES OF PROFESSIONAL CONDUCT Scope Note (1993).

80. To avoid misunderstandings concerning confidentiality, however, several authors have suggested that attorneys should discuss the matter with their clients at the beginning

Theoretically, the *Harris* ruling could affect disciplinary proceedings brought by the Attorney Grievance Commission against attorneys for violations of rule 1.6. It seems unlikely, however, that a client would initiate a grievance action against his or her attorney for a disclosure that the client felt was harmless.[81] If a client in such a situation did complain, the tribunal would still have to take into account the seriousness of the revelation in determining what, if any, sanctions to impose.[82] A disclosure in which the client admittedly suffered no harm would probably be dealt with on a "de minimis" basis.

The *Harris* decision also should not significantly affect the conflict of interest analysis under rules 1.9 and 1.10 of the Rules of Professional Conduct. The focus of rule 1.9[83] is not on whether the information about the former client is confidential under rule 1.6, but on whether its *use* by the attorney in another matter would be "to the *disadvantage* of the former client."[84] Such use is prohibited except as allowed under rule 1.6(b), which was not changed by *Harris*.

Rule 1.10 concerns the issue of whether, when an attorney in a law firm has information about a former client that is protected by rule 1.6, that information is "material to the matter" concerning the potential new client, and whether the new client's interests are "materially adverse" to those of the former client.[85] These determinations

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of the relationship. *See, e.g.*, Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About the Limits of Confidentiality*, 39 CATH. U. L. REV. 441 (1990) (discussing the legal and moral foundations of the confidentiality rule and concluding that lawyers have an ethical duty to inform clients of the extent and limits of confidentiality). The importance of such consultation is even greater in Maryland as a result of the *Harris* decision.

81. Rule 1.6 complaints are in fact quite rare. In fiscal year 1993, of the 493 cases docketed by the Attorney Grievance Commission of Maryland, only three were docketed under rule 1.6. For the first two months of fiscal year 1994, of 102 cases, only one was docketed under rule 1.6. Letter from Melvin Hirshman, Bar Counsel, Attorney Grievance Commission of Maryland, to the author (Sept. 29, 1993) (on file with the *Maryland Law Review*). Since the adoption of the Model Rules, the only reported Maryland decision involving rule 1.6 concerned an attorney who was *too* protective of his client's interests—rather than not protective enough—to the detriment of his duty of truthfulness to other persons and the court. *See* Attorney Griev. Comm'n v. Rohrback, 323 Md. 79, 591 A.2d 488 (1991).

82. MD. RULES OF PROFESSIONAL CONDUCT Scope Note (1993). "[T]he Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of the sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations." *Id.*

83. Rule 1.9 states in pertinent part that "[a] lawyer who has formerly represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known."
MD. RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1993).

84. *Id.* Rule 1.9 cmt. (emphasis added).

85. Rule 1.10 states in part:

require the exercise of discretion by the firm, but it seems inevitable that if these two conditions are met, then revelation of the information concerning the former client would be potentially harmful to that client and, therefore, protected under even the *Harris* interpretation of rule 1.6.

5. Conclusion.—The Court of Appeals's decision in *Harris* to limit the scope of confidentiality under rule 1.6 to information that, if disclosed, would potentially harm a client's interests, is a step back in the direction of rule 1.6's predecessor in the Code of Professional Responsibility. The *Harris* decision will primarily affect state agencies subject to the Maryland Public Information Act, such as the Office of the Public Defender. They will now have to show the potential for harm to their clients as a justification for not disclosing requested information. The impact on private attorneys will be small, in contrast, because they are not subject to the MPIA, and malpractice or disciplinary actions against attorneys in the absence of harm to a client's interests are very rare.

One unfortunate consequence of the court's decision in *Harris* is that rule 1.6 has lost much of its simplicity and clarity as a standard to guide lawyers' conduct. However, no one has suggested that attorneys did not take seriously their duty under the Code of Professional Responsibility to protect client information.[86] Any fear that this decision will lead to less care by attorneys in protecting client confidences would seem to ignore the traditional reputation of attorneys for discretion.

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> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

MD. RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1993).

86. On the contrary, much of the debate preceding the adoption of rule 1.6 was motivated by the belief that attorneys are *too* protective of their clients' confidences. HAZARD & HODES, *supra* note 23, § 1.6:101.

XII. REAL PROPERTY

A. *Limiting the Scope of Personal Liability Under the Maryland Construction Trust Statute*

In *Ferguson Trenching Co. v. Kiehne*,[1] a case of first impression, the Court of Appeals construed the Maryland construction trust statute.[2] The statute requires general contractors to hold in trust any moneys that owners pay them for work performed or materials furnished by subcontractors. The statute also provides for the personal liability of corporate officers, directors, and employees who retain or use such funds with fraudulent intent.[3] In *Ferguson Trenching*, the court held that mere use of trust funds for purposes other than paying subcontractors did not provide conclusive evidence of an intent to defraud.[4] The court also held that an officer was not a fiduciary with respect to a party that contracts with the corporation.[5] The decision limits the scope of personal liability under the trust statute and weakens the subcontractor's rights to construction payments.

1. The Case.—On August 16, 1989, Advanced Excavation Company, a general contractor, contracted with Triple Brook Partnership to perform excavation work for one of Triple Brook's real estate development projects.[6] The contract price for this work was $279,380.[7] One month later, Advanced Excavation executed a $44,549 contract with Ferguson Trenching Company, a subcontractor, for the installation of a water line on the Triple Brook job.[8] Ferguson Trenching fully performed the installation and billed Advanced Excavation for the contract price.[9]

Advanced Excavation never paid Ferguson Trenching,[10] even though C. Stuart Kiehne, Advanced Excavation's president and sole shareholder, admitted that Triple Brook paid Advanced Excavation in full for the work that Ferguson Trenching performed.[11] Triple Brook

1. 329 Md. 169, 618 A.2d 735 (1993).
2. MD. CODE ANN., REAL PROP. §§ 9-201 to -204 (1988).
3. *Id.*
4. *Ferguson Trenching*, 329 Md. at 183, 618 A.2d at 742.
5. *See id.* at 179, 618 A.2d at 740.
6. *Id.* at 172, 618 A.2d at 736.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Brief for Appellant at 2 (citing Joint Record Extract at 52-53).

paid $251,000 toward its $279,380 contract with Advanced Excavation.[12] Out of this $251,000, Advanced Excavation paid $78,000 to subcontractors other than Ferguson Trenching, $82,000 in equipment costs for the project, $46,000 in direct labor costs, and the remaining $45,000 to its operating expenses and debts incurred in connection with other construction projects.[13]

Ferguson Trenching obtained a judgment against Advanced Excavation for the contract price[14] and then brought an action against Kiehne in the Circuit Court for Anne Arundel County alleging that he violated the Maryland construction trust statute.[15] Ferguson Trenching claimed that Kiehne became personally liable under section 9-202 of the Real Property Article when he used funds held in trust for Ferguson Trenching to pay other debts of Advanced Excavation.[16] After a bench trial, the judge for the circuit court concluded that mere proof that the funds went to pay other general corporate expenses did not reveal an intent to defraud and entered judgment against Ferguson Trenching.[17] The judge based his conclusion in part on Kiehne's explanation that he used the trust funds in an attempt to keep the

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12. *Id.*

13. *Ferguson Trenching*, 329 Md. at 172, 618 A.2d at 736.

14. *Id.*

15. *Id.* Section 9-201 of the Maryland construction trust statute provides:

> Any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, *shall be held in trust* by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.

MD. CODE ANN., REAL PROP. § 9-201(a) (1988) (emphasis added).

16. *Ferguson Trenching*, 329 Md. at 173, 618 A.2d at 737. Section 9-202 provides:

> Any officer, director, or employee of any contractor or subcontractor, who, with *intent to defraud*, retains or uses the moneys held in trust under § 9-201 of this subtitle, or any part thereof, for any purpose other than to pay those subcontractors for whom the moneys are held in trust, shall be personally liable to any person damaged by the action.

MD. CODE ANN., REAL PROP. § 9-202 (1988) (emphasis added). Section 9-203 is an evidentiary rule which reads:

> The use by a contractor or subcontractor or any officer, director or employee of a contractor or subcontractor of any moneys held in trust under § 9-201 of this subtitle, for any other purpose than to pay those subcontractors who did work or furnished materials, or both, for or about the building, shall be prima facie evidence of intent to defraud in a civil action.

Id. § 9-203.

17. *Ferguson Trenching*, 329 Md. at 173-74, 618 A.2d at 737.

corporation solvent.[18] The judge also found Advanced Excavation's operating expenses legitimate.[19]

Ferguson Trenching appealed the circuit court's ruling.[20] Before the case reached the Court of Special Appeals, the Court of Appeals issued a writ of certiorari on its own motion.[21] In a unanimous opinion written by Judge Chasanow, the Court of Appeals affirmed the decision of the circuit court.[22]

2. Legal Background.—

a. Maryland.—In 1987, the General Assembly enacted the construction trust statute "to protect subcontractors from dishonest practices by general contractors and other subcontractors for whom they might work."[23] The statute was enacted in response to concerns in the construction industry regarding contractors who fail to pay subcontractors, subsequently declare bankruptcy, and then reopen for business under new names.[24] The statute imposes personal liability

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18. *Id.* In reaching his decision, the judge noted (1) that when Kiehne purchased Advanced Excavation, the business "was undergoing financial difficulties," (2) that these difficulties "were made even more severe by the decline in the development industry from 1989 to the present period," and (3) that Kiehne had "placed large amounts . . . of his own funds into the company in an attempt to keep the corporation solvent." *Id.*

19. *See* Joint Record Extract at 157-58. The trial judge noted that Kiehne's salary was not excessive. *Id.*

20. *Ferguson Trenching*, 329 Md. at 174, 618 A.2d at 737.

21. *Id.*

22. *Id.* at 187, 618 A.2d at 744.

23. *Id.* at 174-75, 618 A.2d at 737; *see also* David F. Albright, Jr., *The Maryland Construction Trust Statute: New Personal Liability—Its Scope and Federal Bankruptcy Implications*, 17 U. BALT. L. REV. 482, 494 (1988) (noting that the statute's primary purpose is the imposition of personal liability on the wrongful diverters of trust funds).

> Part of the original draft of the statute read as follows:
> For the purpose of establishing a trust relationship for certain moneys paid to a contractor or subcontractor; providing that certain uses of those moneys considered to be held in trust shall be prima facie evidence of intent to defraud; providing for personal liability for fraudulent use of those moneys considered to be held in trust . . . .

Act of July 1, 1987, ch. 345, 1987 Md. Laws 1932. The original bill that the Senate proposed included criminal sanctions for misuse of funds in addition to the civil remedy. *Id.* at 1933.

24. Albright, *supra* note 23, at 484 & n.13. The legislative history expresses concern regarding the effect of a subcontractor's failure:

> A major subcontractor's financial failure precipitates a chain reaction due to the accumulation of unpaid monies to their subcontractors and suppliers that must be repaid by the owner or general contractor to free the project from mechanics' liens.
>
> Virtually every major construction project sees a subcontractor fail financially. To the extent that the retainage is inadequate to cover the unpaid subcontractors and suppliers of the failed subcontractor for work performed, the general

directly on the nonpaying contractor,[25] in contrast to the mechanics' lien statute,[26] which authorizes subcontractors to assert a lien against the property for which they provided services.[27]

The construction trust statute created a civil cause of action with two separate bases of liability.[28] Section 9-201 establishes a trust relationship between the parties to the construction contract.[29] Section 9-202 provides for the personal liability of officers, directors, and employees who retain or use trust funds with an intent to defraud.[30] Section 9-203 states an evidentiary rule that makes the use of trust funds for purposes other than the payment of subcontractors prima facie evidence of an intent to defraud.[31] Prior to *Ferguson Trenching*, no Maryland court had reviewed the construction trust statute.[32]

b. Generally.—Many states have enacted trust fund statutes to supplement traditional mechanics' lien remedies.[33] Trust fund statutes are often an unpaid subcontractor's sole remedy because, unlike Maryland's statute, most states' mechanics' lien statutes permit a sub-

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> contractor or owner must make up that difference. Usually the failed subcontractor simply reopens business under a new name and continues to plague our industry.

Id. (quoting Letter from Phillip W. Worrall, President, Maryland Society of the American Institute of Architects, to the Honorable Walter M. Baker (Mar. 10, 1987) (concerning Senate Bill 374)).

25. MD. CODE ANN., REAL PROP. § 9-202 (1988). The statute applies to both public and private construction contracts, with the exception of single family dwelling contracts or home improvement contracts. *Id.* § 9-204 (1988 & Supp. 1992).

26. MD. CODE ANN., REAL PROP. §§ 9-101 to -114 (1988).

27. *Id.* The mechanics' lien statute provides that unpaid contractors and subcontractors can assert a lien against the property for which they provided materials and/or labor. *Id.* § 9-102(a). They need not be in contractual privity with the owner to assert a lien. *Id.* § 9-105. Furthermore, except in the case of a single family dwelling, the statute imposes no limitation on the amount that may be claimed by the lienor. *See id.* § 9-104(f).

28. *See Ferguson Trenching*, 329 Md. at 175, 619 A.2d at 737.

29. MD. CODE ANN., REAL PROP. § 9-201 (1988); *see supra* note 15.

30. MD. CODE ANN., REAL PROP. § 9-202 (1988); *see supra* note 16.

31. MD. CODE ANN., REAL PROP. § 9-203 (1988); *see supra* note 16.

32. The federal bankruptcy court had reviewed the statute in five separate cases. In all of those cases, the court addressed whether the Maryland construction trust statute creates a fiduciary relationship for purposes of the nondischargeability provision of the Bankruptcy Code. 11 U.S.C. § 523(a)(4) (1988). The decisions are divided as to whether the standards for fraud and fiduciary capacity under the trust statute meet the § 523(a)(4) requirements of actual fraud and existence of a technical or express trust. *See In re* Piercy, 140 B.R. 108 (Bankr. D. Md. 1992); *In re* Marino, 139 B.R. 380 (Bankr. D. Md. 1992); *In re* Parks, 141 B.R. 92 (Bankr. D. Md. 1991); *In re* Holmes, 117 B.R. 848 (Bankr. D. Md. 1990); *In re* Marino, 115 B.R. 863 (Bankr. D. Md. 1990).

33. *See, e.g.*, KY. REV. STAT. ANN. § 376.070 (Baldwin 1981); MICH. COMP. LAWS ANN. § 570.151-.153 (West 1967); N.Y. LIEN LAW §§ 70-79 (McKinney 1966 & Supp. 1993); OKLA. STAT. ANN. tit. 42, §§ 152-153 (West 1990); TEX. PROP. CODE ANN. § 162.001-.033 (West 1984); WIS. STAT. ANN. §§ 779.02(5), 779.16 (West 1981).

contractor to recover from the property owner only the amount due the contractor under the prime contract.[34] Like Maryland, most states have trust fund statutes providing that contractors must hold funds in trust for the benefit of subcontractors.[35] The statutes vary considerably, however, both in terms of the language used and the remedies or sanctions provided.[36]

In contrast to an express trust, which is based on the parties' intent to create a trust relationship,[37] trust fund statutes mandate the creation of a statutory trust.[38] The difference between the two types of trusts is important in cases in which a beneficiary seeks to hold the officers of a corporate trustee liable.[39] Under the traditional express trust rule, an officer or agent who knowingly breaches an express trust administered by a corporation is personally liable.[40] Whether a legislature intended that the traditional rule apply to its trust statute is a question of statutory interpretation.[41] Some states have codified express trust theory in their statutes.[42] The New York statute, for exam-

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34. *See, e.g.*, VA. CODE ANN. § 43-7 (1986); N.Y. LIEN LAW § 4 (McKinney 1966 & Supp. 1993).

35. The Oklahoma statute, for example, prohibits any use of trust funds for other purposes prior to the payment of all lienable claims. *See* OKLA. STAT. ANN. tit. 42, § 153(1) (West 1990); *see also* Burmeister Woodwork Co. v. Friedel, 222 N.W.2d 647, 652 (Wis. 1974) ("The statute imposes the trust to insure that one who receives money for this purpose uses it to that end.").

36. For example, some states' statutes impose criminal sanctions for a diversion of construction trust funds. *See, e.g.*, LA. REV. STAT. ANN. § 14.202 (West 1986); GA. CODE ANN. § 16-8-15(a) (1992).

37. *See* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1, at 11 (2d ed. 1965) (stating that when based upon the expressed intent of the settlor, trusts are called express).

38. *See* Howard L. Meyer, *Trust Fund Provisions of the New York Mechanics Lien Law*, 10 BUFF. L. REV. 314, 324 (1961) (recognizing that lien law trust funds are solely a creature of the legislature). The *Restatement* notes only one type of statutory trust—a right of action for death by wrongful act to an executor, administrator, or other person. RESTATEMENT (SECOND) OF TRUSTS § 17 cmt. i (1959); *see also* Aquilino v. United States, 363 U.S. 509 (1960) (recognizing a statutory trust); Matter of Kawczynski, 442 F. Supp. 413, 417 (W.D.N.Y. 1977) (stating that an inherent feature of a statutory trust is the absence of a trust agreement).

39. *See* Meyer, *supra* note 38, at 322-25 (stating that breach of an express trust will result in personal liability for the corporate officer whereas the courts are split on whether the breach of a statutory trust will result in personal liability).

40. 3A WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA ON THE LAW OF PRIVATE CORPORATIONS § 1141 (1986).

41. *See* Meyer, *supra* note 38, at 324 (stating that the primary question as to whether an action will lie against a corporate officer is whether a court will find any legislative authority for such an action under the governing statute).

42. *See* Carey Lumber Co. v. Bell, 615 F.2d 370, 374 (5th Cir. 1980) (holding that the Oklahoma lien trust statute creates an express trust because it clearly defines the trust res and charges the trustee with affirmative duties in applying trust funds); *In re* Polidoro, 12

ple, requires lien law trustees to keep detailed books and records with respect to each trust.[43]

3. The Court's Reasoning.—In reaching its decision in *Ferguson Trenching,* the Court of Appeals first addressed whether a corporate officer has a fiduciary duty to a corporate creditor under section 9-201.[44] The relevant portion of the statute provides that "moneys . . . shall be held in trust by the *contractor* or *subcontractor,* as trustee."[45] Ferguson Trenching argued that the trial court failed to recognize Kiehne's status as a fiduciary and thus did not impose the obligations of a fiduciary on him.[46] The court, however, refused to extend the trust relationship to corporate officers. Examining the statute's plain language, the court stated that "[n]othing in the statute makes a corporate officer, director, or employee a fiduciary with respect to a party that has entered into a contract with the corporation."[47] To bolster its argument, the court contrasted the Maryland statute with statutes in two other states that explicitly provide for the general fiduciary liability of officers.[48] The court concluded that Kiehne owed no fiduciary duty to Ferguson Trenching because he was not a party to the contract between it and Advanced Excavation.[49]

B.R. 867, 871 (Bankr. E.D.N.Y. 1981) (noting that the New York courts have made the liability of managing officers coextensive with that of the corporate contractor).

43. N.Y. LIEN LAW § 75 (McKinney 1966 & Supp. 1993). *But see In re* Boyle, 819 F.2d 583, 586 (5th Cir. 1987) (stating that the Texas statute "does not create 'red,' 'blue,' and 'yellow' dollars each of which can only be used for the 'red,' 'blue,' or 'yellow' construction project").

44. *Ferguson Trenching,* 329 Md. at 177, 618 A.2d at 739.

45. MD. CODE ANN., REAL PROP. § 9-201(a) (1988) (emphasis added).

46. *Ferguson Trenching,* 329 Md. at 174, 618 A.2d at 737. The court did not address the duties of a party made a trustee by the construction trust statute. *See id.* at 178, 618 A.2d at 739; *see also* Green v. Lombard, 28 Md. App. 1, 343 A.2d 905, 909 (1975) (recognizing that the duty of a fiduciary to "exercise the care and skill of a man of ordinary prudence dealing with his own property" has long been the standard in Maryland); 2 AUSTIN W. SCOTT, THE LAW OF TRUSTS §§ 172, 174 (3d ed. 1967) (discussing generally the duties of a trustee in administering a trust).

47. *Ferguson Trenching,* 329 Md. at 177, 618 A.2d at 739.

48. *See id.* at 179, 618 A.2d at 739. The court contrasted the Maryland statute with the Oklahoma and Texas construction trust statutes. *Id.* at 178-79. The Oklahoma statute provides: "If the party receiving any money under Section 152 . . . shall be a corporation, such corporation and its *managing officers* shall be liable for the proper application of such trust funds." OKLA. STAT. ANN. tit. 42, § 153(3) (West 1990) (emphasis added). The relevant portion of the Texas statute provides: "A contractor, subcontractor, or *owner* or an *officer, director,* or *agent* of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds." TEX. PROP. CODE ANN. § 162.002 (West 1984) (emphasis added).

49. *See Ferguson Trenching,* 329 Md. at 179, 618 A.2d at 740.

The Court of Appeals next addressed whether the trial judge properly interpreted the trust statute's personal liability provision.[50] The court compared the provision to two now-superseded Maryland theft statutes[51] to illustrate that, by making misuse of trust funds prima facie evidence of intent to defraud, section 9-203 provides a claimant with an important evidentiary "boost."[52] The court explained that "proof of the diversion of funds allows a plaintiff's case to reach the fact finder without the plaintiff otherwise having to prove the defendant's intent to defraud."[53] Noting that the law of presumptions is wrought with entanglement, the court explained that it did not need to determine whether this "boost" signifies a rebuttable presumption or a permissible inference of intent to defraud.[54] The court did conclude, however, that prima facie evidence is not the equivalent of a conclusive presumption.[55]

Finally, the court interpreted the term "intent to defraud" for purposes of section 9-202.[56] The court considered several state and federal court decisions interpreting the meaning of intent to defraud in various penal provisions.[57] Based on those decisions, the court determined that intent to defraud generally requires some form of bad faith or dishonesty.[58] Applying this definition, the court ruled that there was sufficient evidence before the circuit court to negate the prima facie presumption that Kiehne acted with intent to defraud.[59] The court stated that the trial judge "could have found that Kiehne genuinely believed Advanced would be able to pay Ferguson what it was owed . . . ."[60]

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50. *Id.* Section 9-203 states that misuse of trust funds is prima facie evidence of intent to defraud. MD. CODE ANN., REAL PROP. § 9-203 (1988).

51. MD. ANN. CODE art. 27, §§ 140 (false pretenses), 142 (Worthless Check Act) (1992) (superseded).

52. *Ferguson Trenching*, 329 Md. at 181-83, 618 A.2d at 742.

53. *Id.*

54. *Id.* at 182, 618 A.2d at 741. The court stated that it could decide the issue in the case without becoming entangled in the law of presumptions—previously characterized as "the slipperiest member of the family of legal terms . . . ." *Id.* (quoting EDMOND W. CLEARY, MCCORMICK ON EVIDENCE § 342, at 965 (3d ed. 1984)).

55. *Id.* at 182-83, 618 A.2d at 741.

56. *Id.* at 183, 618 A.2d at 742.

57. *Id.* at 184-86, 618 A.2d at 742-43. *See generally* United States v. Williams, 728 F.2d 1402 (11th Cir. 1984) (mail fraud prosecution); United States v. Ammons, 464 F.2d 414 (8th Cir.) (mail fraud prosecution), *cert. denied*, 409 U.S. 988 (1972); Barghout v. Mayor, 325 Md. 311, 600 A.2d 841 (1992) (Baltimore City ordinance forbidding the representation of nonkosher food as kosher); Roderick v. State, 9 Md. App. 120, 262 A.2d 783 (1970) (larceny after trust).

58. *Ferguson Trenching*, 329 Md. at 186, 618 A.2d at 743.

59. *Id.* at 187, 618 A.2d at 744.

60. *Id.*

4. Analysis.—In concluding that Kiehne owed no fiduciary duty to Ferguson Trenching, the *Ferguson Trenching* court upheld the long-established principle that statutes should be construed consistent with their plain meaning.[61] Moreover, the court's reasoning comports with the rule that statutes should be read "so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory . . . ."[62] If the General Assembly had intended to apply the traditional rule governing trusts—that a corporate officer's personal liability is coextensive with the liability of the corporation[63]—then it would not have needed to enact section 9-202. Rather, section 9-202, which requires that the subcontractor prove the officer's intent to defraud, would have been superfluous.

Although the court's decision comports with traditional notions of statutory construction, refusing to impose a fiduciary duty on the corporate officer has rendered the statute virtually meaningless. Because a corporation is merely an artificial entity, its officers necessarily are charged with administering trusts under the statute. Under the traditional rule, "[t]he trustee of an express trust may not commingle trust funds with his general funds. He must treat all beneficiaries of the same class with strict impartiality. The crime of diversion is committed the instant he uses the funds for an improper purpose."[64] Imposition of this traditional rule undoubtedly would have strengthened the subcontractor's rights to construction payments.

A technical analysis of the construction trust statute supports the court's conclusion that the prima facie evidence provision of section 9-203 is not the equivalent of a conclusive presumption of intent to defraud.[65] The legislature can create a conclusive presumption as to the validity of a certain fact, but such a provision is essentially an alteration of the substantive law.[66] If the construction trust statute did *not* require proof of intent to defraud to impose personal liability on an officer, the prima facie evidence rule could be interpreted as creating a conclusive presumption of intent to defraud. Thus, evidence of mis-

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61. *See* Management Personnel Servs., Inc. v. Sandefur, 300 Md. 332, 341, 478 A.2d 310, 314 (1984) (stating the rule that when the language of a statute is clear and unambiguous, there is usually no need to look elsewhere to ascertain the legislature's intent).

62. Police Comm'r v. Dowling, 281 Md. 412, 419, 379 A.2d 1007, 1011 (1977).

63. *See supra* notes 39-40 and accompanying text.

64. Meyer, *supra* note 38, at 326; *see also* Joseph H. Bocock, *Liens: Mechanic's and Materialmen's Liens: Oklahoma's Trust Fund Provisions*, 31 OKLA. L. REV. 199, 201 (1978).

65. *See Ferguson Trenching*, 329 Md. at 182-83, 618 A.2d at 741.

66. *See* State v. Lapointe, 123 A. 692, 696 (N.H. 1924) ("Such a statute is not in substance a direction that certain evidence shall have a fixed weight, but that a certain fact need not be proved; or stated more directly, that the fact no longer enters into the issue.").

use alone would determine the issue of liability.[67] As the statute reads now, however, section 9-203 is merely a rule of evidence. It regulates the duty to go forward with the production of evidence on the issue of fraudulent intent.[68]

Exactly how the statute regulates this duty is unclear. By refusing to choose between the two competing views of the meaning of prima facie evidence,[69] the Court of Appeals failed to provide guidelines for the operation of section 9-203 in practice. Specifically, it is not clear whether proof of diversion of funds means that the subcontractor has proven its case when the corporate officer presents no evidence to rebut a claim of intent to defraud,[70] or whether proof of diversion merely signifies that the subcontractor's case will survive a contractor's motion to dismiss.[71] The latter approach would further weaken the statute's ability to protect subcontractors because it would require a subcontractor to persuade the court that an officer's misuse of trust funds is evidence of bad faith.

The *Ferguson Trenching* court's analysis ignores the purpose of the legislature in enacting the construction trust statute.[72] Under *Ferguson Trenching*, the remedy provided by the statute is only a negligible improvement over the common law action for fraud. An action for fraud requires the injured party to affirmatively establish an intent to defraud without the aid of any presumptions.[73] To give the construction trust statute some effect, the court should have broadly interpreted the statute's intent to defraud requirement to mean any intentional

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67. Section 9-203 defines misuse as "use . . . of any moneys held in trust . . . for any other purpose than to pay those subcontractors who did work . . . ." MD. CODE ANN., REAL PROP. § 9-203 (1988).

68. *See Lapointe*, 123 A. at 696 (stating that the rules of prima facie proof merely regulate the duty to go forward with the production of evidence).

69. *See supra* notes 52-55 and accompanying text.

70. *See* LYNN MCLAIN, MARYLAND EVIDENCE § 301.4, at 231 n.16 (1987) (suggesting that use of the term "prima facie" is meant to create a true rebuttable presumption).

71. *See* MCCORMICK, *supra* note 54, § 342, at 965 n.4 (using "prima facie" to mean evidence that is sufficient to withstand a motion for directed verdict).

According to Professor Wigmore,

> The difference between these two senses of the term is practically of the greatest consequence, for, in the latter sense [permissible inference], it means merely that the proponent is safe in having relieved himself of his duty of going forward, while in the former sense [rebuttable presumption] it signifies that he has further succeeded in creating it anew for his opponent.

9 WIGMORE ON EVIDENCE, § 2494, at 381 (James H. Chadbourn ed., 1981).

72. *See supra* notes 23-24 and accompanying text.

73. *See* Everett v. Baltimore Gas & Elec., 307 Md. 286, 300, 513 A.2d 882, 889 (1986) (setting forth the five elements a party must show to prove fraud).

use of funds inconsistent with the trust.[74] The court then could have found Kiehne's proof insufficient to rebut the presumption supplied by section 9-203 and, in so doing, afforded the subcontractor a remedy.

Under such an interpretation of intent to defraud, a corporate officer still could assert a valid defense of mistake of fact. For example, an officer could establish that he thought the subcontractor had already been paid, or that he was not aware of any outstanding balance. On the contrary, neither financial hardship nor an honest intention to pay the subcontractor in the future would properly negate fraudulent intent. A contractor's financial problems would not remove or alter the statute's limitation on the use of trust funds.[75] The use of trust funds to pay other corporate expenses with knowledge of a subcontractor's right to payment would satisfy the proof requirement to establish an intent to defraud, regardless of the corporation's threatened insolvency or the legitimacy of its expenses.[76] Defining an intent to defraud as an intentional use of funds inconsistent with the trust would implement the legislature's purpose to protect the subcontractor by expanding the scope of the contractor's officer's personal liability.[77]

The *Ferguson Trenching* court set forth an extremely narrow definition of intent to defraud. As a result of the court's decision, to prevail on a fraudulent diversion claim, a subcontractor must present evidence that the contractor had no intention to pay the amount owed. The court stated that "the [construction trust] statute enhances the personal liability of corporate officers and directors,"[78] but the court's narrow view of the statute's prima facie presumption under the statute will result in more dismissals in the circuit courts.

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74. *See* Owens v. Drywall & Acoustical Supply Corp., 325 F. Supp. 397, 400 (S.D. Tex. 1971) (stating that within the limitations of the statutory terms, courts should strive for broad construction to effectuate a statute's protective purposes); *see also* State v. Barnes, 273 Md. 195, 208, 328 A.2d 737, 744 (1974) (noting that statutes designed to redress existing grievances should be construed liberally to "advance the remedy and obviate the mischief").

75. *See* Burmeister Woodwork Co. v. Friedel, 222 N.W.2d 647, 651 (Wis. 1974) ("The fact that the corporation needed funds for other purposes did not change the limitation on the use of trust funds. . . . [The statute] is not concerned with the financial problems of corporations.").

76. *See* State v. Sobkowiak, 496 N.W.2d 620, 626 (Wis. Ct. App. 1992) (holding that the "intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust").

77. Albright has stated that the construction trust statute was designed to complement Maryland's mechanics' lien statute and "to reinforce the rights and responsibilities of contractors and subcontractors in the construction industry." Albright, *supra* note 23, at 482.

78. *Ferguson Trenching*, 329 Md. at 183, 618 A.2d at 742.

5. Conclusion.—The *Ferguson Trenching* decision is a product of the Court of Appeals's struggle to find legislative authority for holding corporate officers liable for misuse of construction trust funds. Unfortunately for subcontractors in Maryland, the court construed the construction trust statute to limit significantly the scope of personal liability. The court's decision establishes that when the personal liability of a corporate officer is at issue, the construction trust statute will be narrowly construed in the officer's favor. Subcontractors can now recover from corporate officers of the general contractor only by producing the proverbial "smoking gun."

Subcontractors who fail to obtain personal guarantees or secure bonds for payment still, however, have access to compensation through a timely filing of a mechanics' lien. Thus, the most significant effect of *Ferguson Trenching* is that it allows fraudulent diverters of trust funds to escape largely unscathed. This effect inures to the detriment of owners as well as to subcontractors. The General Assembly could change the law by amending the statute to codify express trust theory and thus clarify subcontractors' rights under the statute. Alternatively, the court could reinterpret the statute's intent requirement to make recovery less burdensome.

JENNIFER L. CHAPIN

B. Clarifying Maryland's Statutorily Implied Warranties

In *Andrulis v. Levin Construction Corp.*,[1] the Court of Appeals held that Maryland's statutorily implied warranties do not apply solely to work done by builders in or on new homes.[2] Confronting an issue of first impression, the *Andrulis* court held that section 10-203(a) of the Real Property Article[3] encompasses all work that is "a part of" a private dwelling unit, including defects to items not immediately attached to the dwelling unit and defects to fixtures and structures outside the dwelling unit not necessary for its structural stability.[4] In so holding, the court rejected the argument that the definitional limitations on "new homes" found in section 10-601(i)(2)[5] restrict the definition of "improvements" in section 10-203(a).[6] The *Andrulis* decision clarified

1. 331 Md. 354, 628 A.2d 197 (1993).

2. *Id.* at 364-65, 628 A.2d at 202.

3. MD. CODE ANN., REAL PROP. § 10-203(a) (1988); *see infra* note 15 (quoting relevant portions of § 10-203(a)).

4. *Andrulis*, 331 Md. at 364-65, 628 A.2d at 202.

5. MD. CODE ANN., REAL PROP. § 10-601(i)(2) (Supp. 1993).

6. *Andrulis*, 331 Md. at 365, 628 A.2d at 202.

Maryland law and expanded the protection available to purchasers of new homes. This expansion of consumer protection comports with case law and statutory enactments in other jurisdictions and will serve to reduce the bargaining disparity between new home builders and purchasers.[7]

1. The Case.—In 1987, the Levin Construction Corporation (Levin) began building a house in Montgomery County, Maryland.[8] In 1988, Levin put the home and lot up for sale and subsequently entered into a purchase contract with Peter and Marilyn Andrulis.[9] At the December 1988 closing, the parties put $15,748 into an escrow account to cover unfinished work.[10]

The Andrulises moved into their home before Levin completed construction.[11] Over the next several months, they discovered numerous defects in both the materials and the workmanship in their new home.[12] Despite the failure to correct these defects, Levin requested that the escrow agent tender the escrow money.[13]

The Andrulises filed a five count complaint in the Circuit Court for Montgomery County.[14] At trial, the court held that Levin had breached the section 10-203 implied warranties applicable to newly completed improvements[15] by failing to correct defects both inside

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7. *See infra* note 24.

8. *Id.* at 356, 628 A.2d at 198.

9. *Id.* Under the contract, Levin agreed to add certain features to the lot, such as a swimming pool to be constructed in 1989, and the Andrulises promised to purchase the land and improvements. *Id.* at 356-57, 628 A.2d at 198. The purchase price of $1,276,900 consisted of $1,241,900 cash at closing and a $35,000 promissory note. *Id.* at 356-57, 628 A.2d at 198.

10. *Id.* at 357, 628 A.2d at 198.

11. Levin Constr. Corp. v. Andrulis, No. 92-1502, slip op. at 1 (Md. Ct. Spec. App. June 10, 1992).

12. *Id.* The contested items included: west side retaining wall, waterproofing of retaining walls, retaining wall weepholes, sidewalk caulking, garage, timber retaining wall, rear yard, catch basin and grates, planter drains and tie-ins, pool lights and light covers, patio slab, front walkway, and fence posts. *Andrulis*, 331 Md. at 359, 628 A.2d at 199.

13. *Levin Constr. Corp.*, No. 92-1502, slip op. at 1. Even though Levin was aware of the Andrulises' claim, Levin informed the escrow agent that all items listed in the escrow agreement had been completed. *Id.*

14. The Andrulises alleged breach of contract, breach of implied warranties, breach of express warranties, and negligence and also sought declaratory and injunctive relief. *Id.* at 2. The last two issues were not brought before the Court of Appeals.

15. MD. CODE ANN., REAL PROP. § 10-203 (1988). Section 10-203 reads in pertinent part:

> (a) *Warranties which are implied.*—Except as provided . . . in every sale, warranties are implied that, at the time of the delivery of the deed to a completed improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

and outside the house.[16] The court entered judgment against Levin for $78,616.40.[17]

On appeal to the Court of Special Appeals, Levin argued that the trial court erred by extending the section 10-203 warranties to items beyond the statute's scope.[18] The Court of Special Appeals agreed and ruled that "the contested items, *except* the garage and retaining walls necessary for the house's structural stability, [were] *not* fixtures or structures made a part of . . . [the house] by Levin" and, thus, were not warranted by section 10-203.[19] The court remanded the case for a determination of which retaining walls were structurally necessary.[20]

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(1) Free from faulty materials;
(2) Constructed according to sound engineering standards;
(3) Constructed in a workmanlike manner; and
(4) Fit for habitation.
(b) *Exception.*—The warranties of subsection (a) do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed.

Id. § 10-203(a), (b).

The definition of improvement is provided in § 10-201(b): "'Improvements' includes every newly constructed private dwelling unit, and fixture and structure which is made a part of a newly constructed private dwelling unit at the time of construction by any building contractor or subcontractor." *Id.* § 10-201(b).

16. *Andrulis*, 331 Md. at 358, 628 A.2d at 199.

17. *Id.* at 357, 628 A.2d at 198. The court explained:

> [T]he total allowances are $138,033. The note, with interest, and the interpled funds with interest, combined, total $59,416.60. The note will be deemed as having been satisfied in these proceedings. The interpled funds will be used, along with the note, as a deduction, leaving, according to my figures, a total of $78,616.40.

Levin, No. 92-1502, slip op. at 3. The court found defects including "a patio that had 'settled far beyond the measure of any warranty,'" misplacement of outlets for three of the home's drains, "no foundation drain on two sides of the house," an improperly installed heating and air conditioning system, and a cracked retaining wall. Brief of Appellant at 3-4.

18. *Levin Constr. Corp.*, No. 92-1502, slip op. at 13. Levin also argued that the Home Owners Warranty Corporation Limited Warranty, which was incorporated into its agreement with the Andrulises, evidenced the parties' intent to exclude certain items from coverage. *Id.* at 13-15. This provision, if applicable, excluded items such as the swimming pool, driveway, patios, and retaining walls. *Id.*

19. *Id.* at 17. The Court of Special Appeals stated that "the warranty provisions embodied in the contract ma[de] it evident that the parties intended to exclude the disputed items, except for the garage and the retaining walls necessary for the house's structural stability, from coverage." *Id.* at 18. Further, the intermediate court ruled that the list of exclusions in § 10-601(i)(1)'s definition of "new home" limited the scope of "improvements" as defined in § 10-201(b). *Andrulis*, 331 Md. at 363, 628 A.2d at 201; *see infra* note 63 and accompanying text.

20. *Id.* at 25. Interpreting the Maryland case law discussing § 10-201(b), the intermediate court held that the disputed items other than the garage and the structurally necessary retaining walls were not improvements and thus beyond this section's scope.

The Andrulises petitioned the Court of Appeals for certiorari, and Levin cross-petitioned.[21] The court granted both petitions to decide whether the section 10-203 warranties apply to work done by the builder on areas other than those in or on the dwelling house.[22]

2. Legal Background.—At common law, no warranties were implied in the sale of real property.[23] Courts and commentators nationwide, however, recognized the disparity in the bargaining positions of buyers and sellers[24] and urged a limitation of the doctrine of caveat emptor through the adoption of implied warranties in the sale of real property.[25] In 1968, the Court of Appeals expressed its support of this

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21. *Andrulis*, 331 Md. at 357, 628 A.2d at 198.

22. *Id.* at 356, 628 A.2d at 198.

23. *See* Leo Bearman, Jr., *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 543 (1961) (noting the general rule under English and American common law that there are no implied warranties in the sale of real estate); Linda S. Woolf, Comment, *Caveat Venditor in Maryland Condominium Sales: Cases and Legislation Imposing Implied Warranties in Sales of Residential Condominiums*, 14 U. BALT. L. REV. 116, 117 (1984) (noting that, under English and American common law, the doctrine of caveat emptor governed the sale of both real and personal property, and sellers made no warranties unless they made them in separate promises).

24. Regardless of whether new home purchasers have the power to shop the real estate market for the best price, they suffer the serious problem of insufficient information. The complexity of home construction and the expense of hiring a building expert to survey the quality of the construction prohibit most buyers from being fully informed. *See, e.g.*, Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966) (recognizing the injustice of applying the rule of caveat emptor to an inexperienced buyer in favor of a builder who is engaged daily in the business of building); Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 799 (Mo. 1972) ("The ordinary 'consumer' can determine little about the soundness of construction but must rely upon the fact that the vendor-builder holds the structure out to the public as fit for use as a residence, and of being of reasonable quality."); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 327 (N.J. 1965) (noting that courts have developed an exception to the rule of caveat emptor in the sale of new homes because homebuyers rely on builders regarding their skill and the house's fitness for habitation).

25. *See, e.g.*, Bearman, *supra* note 23, at 343-48 (discussing the limitations on the doctrine of caveat emptor due to the adoption of implied warranties); Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 648 (1965) (urging courts to give purchasers of real property protection similar to that given to purchasers of chattels by adopting the implied warranty of merchantability); Ronald O. Roeser, *The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois*, 1978 S. ILL. U. L.J. 178, 178 & n.1 (1978) (remarking that the law is now filling the void created by the doctrine of caveat emptor concerning the protection of home buyers through use of implied warranties); 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926A, 810 (3d ed. 1963) (noting that courts have developed exceptions to the rule of caveat emptor in the sale of new housing where the vendor is also the developer or contractor).

In Miller v. Cannon Hill Estates, Ltd., an English court found implied warranties of habitability in the sale of a partially completed house. 2 K.B. 113, 117 (1931). For an acknowledgement of this trend by a Maryland court, see Loch Hill Constr. Co. v. Fricke, 284 Md. 708, 339 A.2d 883 (1979), in which the Court of Appeals stated that the General Assembly, in adopting the implied warranties in § 10-203(a), evinced its intent to protect

view, but determined that such a change in the state's law should be made by the legislature and not through judicial action.[26] The General Assembly responded by enacting Chapter 151 of the Acts of 1970, now sections 10-201 to 10-209 of the Real Property Article.[27]

Section 10-201(b) defines "improvements" as "every *newly* constructed private dwelling unit, and fixture and structure which is made *a part of a newly* constructed private dwelling unit at the time of construction . . . ."[28] Section 10-203(a) provides that, upon either delivery or completion, an improvement must be (1) free from faulty materials, (2) constructed according to sound engineering standards, (3) constructed in a workmanlike manner, and (4) fit for habitation.[29] The legislature made newly completed improvements subject to these warranties in order to protect new home purchasers from latent defects about which builders necessarily have superior knowledge.[30] In 1990, the General Assembly expanded the protections available to new home purchasers by adding sections 10-601 to 10-610 on new home warranties.[31] The purpose of the legislation was to require new home builders to make certain disclosures to purchasers and owners of new homes, to require builders to furnish certain information about new home warranty security plans, and to establish minimum standards to which new home warranty security plans must conform.[32]

Early on Maryland courts made clear that they would afford full statutory protection to buyers when the warranty of habitability ap-

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innocent purchasers from latent defects that make a house not fit for habitation. *Id.* at 718-19, 339 A.2d at 890.

26. Allen v. Wilkinson, 250 Md. 395, 398, 243 A.2d 515, 517 (1968); *see also* Thomas v. Cryer, 251 Md. 725, 726-27, 248 A.2d 795, 795-96 (1969) (reiterating the view that until the General Assembly acts, there are no implied warranties in the sale of a completed residence).

27. MD. CODE ANN., REAL PROP. §§ 10-201 to -209 (1988).

28. *Id.* § 10-201(b) (emphasis added). As originally enacted, § 10-201(b) read: "'Improvements' includes all fixtures and structures *attached to* realty in the nature of private dwelling units." 1970 Md. Laws 151 (emphasis added). Chapter 694 of the 1971 Acts deleted the phrase "attached to realty in the nature of private dwelling units." 1971 Md. Laws 694.

29. MD. CODE ANN., REAL PROP. § 10-203(a) (1988).

30. Loch Hill Constr. Co. v. Fricke, 284 Md. 708, 718-19, 399 A.2d 883, 890 (1979) (considering whether the lack of an adequate well supply renders a new dwelling not "fit for habitation"); Krol v. York Terrace Bldg., Inc., 35 Md. App. 321, 329, 370 A.2d 589, 594 (1977) (holding that interpreting § 10-203 warranties to be applicable only upon delivery of the deed "would deprecate the very purpose of that consumer oriented statute," which was intended to apply to hidden and latent defects).

31. MD. CODE ANN., REAL PROP. §§ 10-601 to -610 (1988 & Supp. 1992). Subtitle 6 also extended the expiration period of implied warranties for structural defects. *Id.* § 10-604(a).

32. 1990 Md. Laws 805-06.

plies, but they did not fully define the meaning of "improvements" covered by the warranty. For example, in *Krol v. York Terrace Building, Inc.*,[33] the Court of Special Appeals held the warranty of habitability to cover the sufficiency of the production of a well supplying water for a new home.[34] The court stated that a well is "clearly a fixture or structure which is made a part of a newly constructed private dwelling unit . . . sufficient to fit the definition of 'improvements' intended to be included under the warranties."[35] The scope of the definition of "improvements," however, remained unclear.[36] While the court specified that the Krols's well fell within the statute's coverage, it failed to address the reasons for its decision or to enumerate other items covered by the warranty.[37]

In *Starfish Condominium Ass'n v. Yorkridge Service Corp.*,[38] the Court of Appeals extended warranty coverage to defects outside individual condominium units by holding that certain common areas in a condominium complex, including stairways and walls, constitute improvements under section 10-201(b).[39] Although intended to clarify the purchaser's rights under section 10-203(a), because the disputed common areas were attached to the dwelling units in the case, the decision left doubt as to whether an improvement's attachment to the realty was a prerequisite to protection under the warranty.[40]

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33. 35 Md. App. 321, 370 A.2d 589 (1977).

34. *Id.* at 332, 370 A.2d at 596. Two weeks after the Krols moved into their new home, the water supply ran out and, for the remainder of the year, they did not have an adequate water supply. *Krol*, 35 Md. App. at 322-23, 370 A.2d at 591; *see also* Loch Hill Constr. Co. v. Fricke, 284 Md. 708, 716, 399 A.2d 883, 889 (1979) (holding that a new dwelling that is without an adequate supply of water breaches the implied warranty of habitability under 10-203(a)).

35. *Krol*, 35 Md. App. at 330, 370 A.2d at 595.

36. The court's analysis of the breach of the § 10-203(d) warranty concerned whether the lack of water made the Krols's home uninhabitable. When considering the habitability of an improvement, courts should interpret "improvements" more expansively because defects that render a new home unlivable must be covered by a warranty. It would be a strange result if a new home was held not fit for habitation, but the purchaser could not hold the builder liable for breach of warranty. Thus, *Krol* left open the scope of "improvements" when the defect does not go to the dwelling's habitability.

37. *See Krol*, 35 Md. App. at 329-34, 370 A.2d at 594-97. Without clarifying its reasoning, the court simply concluded "that a new home which does not contain an adequate supply of useable water is not 'fit for habitation.'" *Id.* at 332, 370 A.2d at 596.

38. 295 Md. 693, 458 A.2d 805 (1982).

39. *Id.* at 703, 458 A.2d at 810. The court also held that defects in electrical wiring, roofs, gutters, downspouts, and air conditioning compressors were covered under § 10-203(a). *Id.*

40. The building in question was a garden style condominium complex in which all areas excluding the individual units constituted common areas. *Id.* at 702-03, 458 A.2d at 810.

Other jurisdictions employ a nonrestrictive interpretation of "improvements," extending implied warranty coverage to "items external to the house or unrelated to its structure."[41] In *Krawiec v. Black Manor Development Corp.*,[42] for example, the Appellate Court of Connecticut construed a statute almost identical to the Maryland implied warranty statute[43] and concluded that "the legislature intended that the implied warranties apply to both the newly constructed single-family dwelling and the lot upon which it sits . . . ."[44] Similarly, in *Christensen v. R.D. Sell Construction Co.*,[45] the Missouri Court of Appeals recognized that the full range of defects that constitute a breach of implied warranty had not been defined[46] and refused to limit coverage to defects such as the cracking of the foundation or the rotting of floors.[47] Although it acknowledged that driveways and stairs are not "in a pure engineering sense, part of the 'structure' of the house,"[48] it extended the warranty to cover these items as well as "all parts constructed."[49] The *Christensen* court stated that limiting the warranty to apply to defects in the stairs and driveway only upon evidence of a structural defect, such as a crack in the foundation, could produce "bizarre" results in warranty applicability.[50] The *Andrulis* court followed this inclusive

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41. Christensen v. R.D. Sell Constr. Co., 774 S.W.2d 535, 538 (Mo. Ct. App. 1989); *see also* Meadowbrook Condominium Ass'n v. South Burlington Realty Co., 565 A.2d 238, 240 (Vt. 1989) (holding that peripheral defects do not have to affect the habitability of the dwelling in order to come under the umbrella of an implied warranty theory).

42. 602 A.2d 1062 (Conn. App. Ct. 1992).

43. CONN. GEN. STAT. §§ 47-116, 47-118 (West 1958). Section 47-118 reads in pertinent part:

> (a) In every sale of an improvement by a vendor to a purchaser, except as provided . . . warranties are implied that the improvement is: (1) Free from faulty materials; (2) constructed according to sound engineering standards; (3) constructed in a workman-like manner, and (4) fit for habitation, at the time of the delivery of the deed to a completed improvement, or at the time of completion of an improvement not completed when the deed is delivered.

Id. § 47-118(a). Section 47-116 provides definitions: "'Improvement' means any newly constructed single family dwelling unit . . . and any fixture or structure which is made a part thereof at the time of construction or conversion . . . ." *Id.* § 47-116.

44. *Krawiec*, 602 A.2d at 1064.

45. 774 S.W.2d 535 (Mo. Ct. App. 1988).

46. *Id.* at 538. The *Christensen* court considered whether the theory of implied warranty covers defects in the driveway and front stairway of the purchaser's new home. *Id.* at 537.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The court noted that if the warranty were limited to structural defects, the driveway could drop 40 feet or the stairs could pull away from the house and no liability would occur. *Id.*

approach toward defining the scope of "improvements" under section 10-201(b).[51]

3. The Court's Reasoning.—Prior to its decision in *Andrulis*, the Court of Appeals had not determined the full range of defects that constitute a breach of the implied warranties provided for under section 10-203.[52] Relying primarily on principles of statutory construction, the *Andrulis* court held that the section 10-203 warranties extend to fixtures and structures that are not immediately attached to the house itself.[53] In so holding, the court broadened the protection available to home purchasers under the statute.[54]

In declaring section 10-203 the controlling statute,[55] the *Andrulis* court rejected the argument that its applicability was limited either by Montgomery County law[56] or by section 10-601 of the Real Property article.[57] Levin argued that the New Home Warranty Security Plan, offered pursuant to section 8.1 of Montgomery County Executive Regulation No. 22-86,[58] excluded certain relevant items from warranty coverage.[59] In rejecting that argument, the court explained that the local regulations of Maryland's chartered counties do not restrict the

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51. *See Andrulis*, 331 Md. at 364, 628 A.2d at 202.

52. *See, e.g.*, Starfish Condominium Ass'n v. Yorkridge Serv. Corp., 295 Md. 693, 703, 458 A.2d 805, 810 (1982) (holding that the common areas of a condominium complex, including stairways and walls, are subject to the § 10-203(a) warranties); Loch Hill Constr. Co., Inc. v. Fricke, 284 Md. 708, 715, 399 A.2d 883, 888 (1979) ("In determining whether an existing condition relating to a new dwelling renders it uninhabitable under section 10-203(a)(4), the test is one of reasonableness."); Krol v. York Terrace Bldg., Inc., 35 Md. App. 321, 329-34, 370 A.2d 589, 594-97 (1977) (holding that a defect in water well constituted a breach of the implied warranty provided by § 10-203, but not enumerating the full range of defects constituting such a breach).

53. *Andrulis*, 331 Md. at 364-65, 628 A.2d at 202.

54. The Court of Special Appeals restricted the warranties to items attached to the dwelling unit or necessary for its structural stability. Levin Constr. Corp. v. Andrulis, No. 92-1502, slip op. at 1, 17 (Md. Ct. Spec. App. June 10, 1992). The Court of Appeals refused to follow this interpretation. *Andrulis*, 331 Md. at 364-65, 628 A.2d at 202.

55. *Andrulis*, 331 Md. at 363, 628 A.2d at 201.

56. *Id.*

57. *Id.* at 364, 628 A.2d at 202. Section 10-601 provides a list of exclusions from new home warranty coverage. MD. CODE ANN., REAL PROP., § 10-601(i)(2) (1988 & Supp. 1992); *see infra* note 63.

58. MONTGOMERY COUNTY, MD., EXEC. REG. NO. 22-86 § 8.1. Section 8.1 permits a builder to use a "private Alternate New Home Warranty Security Plan" if approved by the County. *Id.*

59. *Andrulis*, 331 Md. at 362-63, 628 A.2d at 201. In compliance with § 8.1, Levin furnished the Andrulises with an alternate home warranty document. *Id.* at 362, 628 A.2d at 201. It excluded from warranty coverage "[d]efects in outbuildings including . . . detached garages and detached carports . . . ; site located swimming pools and other recreational facilities; driveways; walkways; patios; boundary walls; retaining walls; . . . or any other improvements not a part of the Home itself." *Id.*

operation of any of the State's general law.[60] The court further noted that subtitle 6 of the Real Property Article does not apply to new home warranties offered in Montgomery County.[61]

The court then turned to the issue of what constitutes "improvements" covered by the section 10-203 warranties. Looking first to the definition of "improvements" in section 10-201(b), the court determined that it included no restrictive language.[62] The court rejected appellant's contention that it should incorporate the specific exclusions found in section 10-601(i)(2) into the section 10-201(b) definition of "improvements."[63] Levin argued that, under the general rules of statutory construction, two statutes pertaining to the same general subject matter "must be construed together and harmonized to the fullest extent possible."[64] Speaking for the court, Judge Rodowsky responded that "the 1990 enactment of Subtitle 6 ha[d] the opposite effect from that for which Levin contends."[65] Although the definition of "new home" in subtitle 6[66] is nearly identical to the definition of "improvement" in subtitle 2,[67] the court held that the specific exclusions found in section 10-601(i)(2) could not be added to section 10-201(b) by judicial fiat.[68]

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60. *Andrulis*, 331 Md. at 363, 628 A.2d at 201; *see* MD. CONST. art. XI-A, § 3 ("In the case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall control.").

61. *Andrulis*, 331 Md. at 363, 628 A.2d at 201 (citing MD. CODE ANN., REAL PROP. § 10-610 (1988 & Supp. 1992)).

62. *Id.* at 364, 628 A.2d at 202.

63. *Id.* at 365, 628 A.2d at 202-03. Among the § 10-601(i)(2) exclusions are the following: outbuildings, driveways, walkways, patios, boundary walls, retaining walls, and landscaping. MD. CODE ANN., REAL PROP. § 10-601(i)(2) (Supp. 1993). The Court of Special Appeals read the excluded items from the § 10-601(i)(2) definition of "new home" into the definition of "improvements" in § 10-201(b), thereby excluding those items from implied warranty coverage. Levin Constr. Corp. v. Andrulis, No. 92-1502, slip op. at 1, 18-19 (Md. Ct. Spec. App. June 10, 1992).

64. *Andrulis*, 331 Md. at 364, 628 A.2d at 202 (quoting Brief for Appellee at 24). In making its argument, Levin relied on Hope v. Baltimore County, 288 Md. 656, 421 A.2d 576 (1980). *Andrulis*, 331 Md. at 364, 628 A.2d at 202. In *Hope*, the court stated, "[w]e have said many times that where two statutes deal with the same subject matter they must be construed together if they are not inconsistent with one another; that, to the extent possible, full effect should be given to each." *Hope*, 288 Md. at 666, 421 A.2d at 581.

65. *Andrulis*, 331 Md. at 365, 628 A.2d at 202.

66. *See* MD. CODE ANN., REAL PROP. § 10-601(i) (Supp. 1993).

67. *See id.* § 10-201(b).

68. *Andrulis*, 331 Md. at 365, 628 A.2d at 202; *accord* Jennings v. Government Employees Ins. Co., 302 Md. 352, 358-59, 488 A.2d 166, 169 (1985) (stating that generally the court will not insert exclusions from statutory coverage beyond those expressly provided for by the legislature); State v. Magliano, 7 Md. App. 286, 297, 255 A.2d 470, 476 (1969) (holding that courts cannot read into statutes exceptions that are not specifically set forth therein); O'Boyles Ice Cream Island, Inc. v. Commonwealth, 605 A.2d 1301, 1302 (Pa. Commw. Ct. 1992) ("Where the legislature includes specific language in one section of a

The court also looked to the relevant case law in the jurisdiction. Citing *Starfish Condominium Ass'n v. Yorkridge Service Corp.*,[69] the court held that the section 10-203 warranties are not limited "to the dwelling unit *per se*, [n]or to fixtures or structures immediately attached to the dwelling unit *per se*. Nor . . . to fixtures or structures outside the walls of the dwelling unit that might be necessary for the structural stability of the dwelling unit."[70] Thus, the court concluded that all of the contested items in the case[71] were a part of the Andrulises' newly constructed private dwelling and, thus, were covered under section 10-203.[72]

4. Analysis.—In *Andrulis*, the Court of Appeals refused to limit the application of Maryland's statutorily implied warranties to items attached to the dwelling unit or necessary for its structural stability.[73] Although the court employed somewhat specious reasoning to arrive at its decision, the holding in the case comports with both the national trend toward affording broader protection to purchasers of new homes[74] and the intent of the Maryland legislature.[75] The decision clarified the scope of the section 10-203 implied warranties, but also left open several questions regarding the extent of the statute's applicability.

The *Andrulis* court supported its interpretation of "improvements" in 10-201(b) with little more than a conclusory statement. It determined simply that a "reading that attempts to limit § 10-203 implied warranties to the dwelling unit *per se* has no support in the lan-

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statute and excludes the language from another, the language should not be implied where excluded.").

69. 295 Md. 693, 458 A.2d 805 (1982).

70. *Andrulis*, 331 Md. at 364-65, 628 A.2d at 202.

71. *See supra* note 12.

72. *Andrulis*, 331 Md. at 365, 628 A.2d at 202. The court summarily dismissed the intermediate court's holding that the terms of the real estate contract evidenced the parties' intent to abrogate the statutorily imposed warranties. *Id.* The court noted that the contract itself stated that Levin would provide applicable warranties as required by the state, *id.* at 365-66, 628 A.2d at 202-03, and that, even if the parties had intended to exclude certain items, they had not complied with section 10-203(d). *Id.* at 366, 628 A.2d at 203. Section 10-203(d) provides: "Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty. . . . [A]n implied warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser setting forth in detail the warranty to be excluded or modified . . . ." *Id.*; *see also* Woolf, *supra* note 23, at 133 ("Disclaimers of warranty liability have been disfavored and will be found ineffective if not in strict compliance with section 10-203(d) of the Real Property Code.").

73. *Andrulis*, 331 Md. 364-65, 628 A.2d at 202.

74. *See supra* notes 24-25, 41-50 and accompanying text.

75. *See supra* notes 27-30 and accompanying text.

guage employed in the statute."[76] It purported to base its interpretation of the term "improvements" on the plain meaning of the statute,[77] but the meaning it assigned the term was not, in fact, the only possible reasonable interpretation. As the Court of Special Appeals's decision demonstrated, the statute also could be read to restrict the definition of improvements.[78] While the Court of Appeals's interpretation was not clearly wrong, citing additional support for the holding, especially in light of the other reasonable interpretations of the statute, would have significantly strengthened the opinion.[79]

Although the *Andrulis* court supported its decision with conclusory logic, the holding itself was not without merit. The court's liberal interpretation of Maryland's consumer protection legislation accords with other jurisdictions that have decreased the disparity of information available to the builders and purchasers in the sale of new homes.[80] Additionally, the *Andrulis* decision is appealing on an emotive level. In the absence of broadly construed warranties, new home purchasers would be without any assurance as to the quality of their new property outside the dwelling unit itself. Home builders sell their houses and lots as a package, not as distinct items.[81] Thus, new home

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76. *Andrulis*, 331 Md. at 364, 628 A.2d at 202.

77. *Id.*

78. Levin Constr. Corp. v. Andrulis, No. 92-1502, slip op. at 17 (Md. Ct. Spec. App. June 10, 1992).

79. *Id.* at 22. The Court of Special Appeals stated that "[t]he plain language of § 10-201(b) mentions that the dwelling unit and any structure and fixture *which is made part of* that structure is encompassed within the scope of the definition." *Id.* In the Court of Special Appeals's opinion, the statute did not cover the items in dispute. *Id.*

For a contrary proposition, see Christensen v. R.D. Sell Constr. Co., 774 S.W.2d 535, 538 (Mo. Ct. App. 1989), which acknowledges that in the pure engineering sense, driveways and stairs *are not part* of the "structure" of a house.

80. *See supra* notes 24-25 and accompanying text; *see also* Hesson v. Walmsley Constr. Co., 422 So. 2d 943, 944 (Fla. Dist. Ct. App. 1982) (recognizing a tendency in recent years for courts to hold developers who sell real property responsible for the quality of their products); WILLISTON, *supra* note 25, § 926A, at 802 ("Over the years, the number of cases which apply the rule of *caveat emptor* strictly appears to be diminishing . . . ."); Woolf, *supra* note 23, at 133-34 ("Developers should consider the consumer-oriented approach that the General Assembly and Maryland courts have taken in regard to sale of consumer goods for it is likely that they will be held to a similar standard."). *See generally* Bearman, *supra* note 23 (discussing the rise of implied warranties in the sale of real property).

81. *See Hesson*, 422 So. 2d at 945 ("We agree with the rationale of these decisions extending the doctrine of implied warranty to a builder-vendor of a new house and lot sold as a package to the original purchaser. As noted, the builder-vendor is in a better position than the buyer to investigate the quality of the land to support the house."); Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co., 454 N.E.2d 363, 365 (Ill. App. Ct. 1983) (holding no real distinction should be recognized between buildings and lots in the application of public policy protecting new home purchasers).

purchasers have a reasonable expectation that their lots will be free from latent defects.[82]

Another source of support for the *Andrulis* decision can be found in the legislative intent of section 10-203. The warranties of section 10-203(a) were a legislative response to a series of court decisions that refrained from judicially implying warranties in the sale of completed residences.[83] The General Assembly enacted the statute to protect new home purchasers and reduce the disparity in information available in the sale of new homes.[84] The *Andrulis* court simply acted on that intent.

The legislature's intent with regard to section 10-201, however, is less clear. As originally enacted, section 10-201(b) included "all fixtures and structures *attached to* realty" in the definition of improvement.[85] The General Assembly deleted the phrase "attached to realty" in the 1971 enactment.[86] While the deletion may appear to reflect the legislature's desire to remove the requirement that structures be attached to the dwelling unit in order to activate the section 10-203 warranties, the Revisor's Note to the section indicates that upon revision "the only changes to subsection (b) '[were] in style.'"[87] The *Andrulis* decision controverts that statement by indicating that it is no longer necessary for a fixture or structure to be attached to the realty to be covered by the section 10-203 warranties.[88]

Uncertainty over the precise scope of Maryland's implied warranties will persist until a legislative proclamation ends the debate. Although *Andrulis* makes clear that coverage of section 10-203(a) extends beyond the dwelling house itself, questions may persist concerning whether Maryland's implied warranties encompass items such as landscaping defects[89] or soil imperfections.[90] Also, section 10-203 im-

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82. Bearman, *supra* note 23, at 541 ("[T]he consumer, not without some justification, logically expects that the law will protect him with equal vigor in a purchase as significant (to his status, his every-day life, and his wallet) as a new home.").

83. *See supra* note 26-27 and accompanying text.

84. *See supra* note 27 and accompanying text.

85. Act of April 15, 1990, ch. 151, 1990 Md. Laws 421 (emphasis added).

86. Act of May 24, 1971, ch. 694, 1971 Md. Laws 1484.

87. *Andrulis*, 331 Md. at 361, 628 A.2d at 200.

88. *Id.* at 364-65, 628 A.2d at 202.

89. *See* Carlson Homes, Inc. v. Messmer, 307 N.W.2d 564, 567 (N.D. 1981) (holding that a home purchaser's allegation that landscaping was done in an unworkmanlike manner adequately outlined a cause of action based on warranty theory).

90. *See* House v. Thornton, 457 P.2d 199, 203 (Wash. 1969) (extending the implied warranty of habitability to a shifting of foundation caused by the instability of the terrain upon which the dwelling was built).

plied warranties apply only to new homes,[91] leaving all subsequent purchasers without its protections. As the courts and legislature broaden the protections available to purchasers of realty, this distinction may become outdated as well. Whatever the legislative response to these concerns, the *Andrulis* decision adheres to the intent of the Maryland legislature: to reduce the information gap between builders and purchasers of new homes.[92]

5. Conclusion.—In *Andrulis,* the Court of Appeals rejected a restrictive reading of the applicability of the section 10-203 warranties. In so holding, the court followed the trend of restricting the doctrine of caveat emptor in the sale of newly completed residences. Although the court did not clearly define the limits of Maryland's implied warranties, the *Andrulis* decision clarified the scope of section 10-203(a) and increased the protections available to new home purchasers.

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91. *See* MD. CODE ANN., REAL PROP. §§ 10-201(b), 10-203 (1988).
92. *See* Loch Hill Constr. Co. v. Fricke, 284 Md. 708, 718-19, 399 A.2d 883, 890 (1979).

XIII. TORTS

A. *The Inapplicability of the Cap on Noneconomic Damages to Wrongful Death Actions*

In *United States v. Streidel*,[1] the Court of Appeals held that Maryland's statutory cap on noneconomic damages in personal injury cases does not apply to wrongful death actions.[2] The court examined the language, context, and legislative history of the statute,[3] as well as case law interpreting the term "personal injury,"[4] before determining that the legislature did not intend to include wrongful death actions in the cap on noneconomic damages in personal injury cases.[5] In so ruling, the court specifically overruled the Court of Special Appeals's holding in *Potomac Electric Power Co. v. Smith*.[6]

1. The Case.—Like many a curious child before him, six year old Marc Streidel wondered where the letters dropped into a mailbox went.[7] When he tried to look into an unsecured mailbox in order to solve this mystery, the mailbox fell on him and killed him.[8] Pursuant to the Federal Tort Claims Act,[9] Marc's parents filed a wrongful death action in the United States District Court for the District of Maryland.[10] The United States conceded liability.[11]

Each parent was awarded $500,000 as compensation for noneconomic damages.[12] Each award was then reduced to $350,000 pursuant to section 11-108 of the Courts and Judicial Proceedings Article.[13] The United States appealed, arguing that the total award to

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1. 329 Md. 533, 620 A.2d 905 (1993).

2. *Id.* at 537, 620 A.2d at 907.

3. *Id.*, 620 A.2d at 908 (examining MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (1989)).

4. *Id.* at 540 n.7, 620 A.2d at 910 n.7.

5. *Id.* at 544, 620 A.2d at 911.

6. 79 Md. App. 591, 558 A.2d 768, *cert. denied*, 317 Md. 393, 564 A.2d 407 (1989), *overruled by* United States v. Streidel, 329 Md. 533, 620 A.2d 905 (1993).

7. *Streidel*, 329 Md. at 535 n.2, 620 A.2d at 906 n.2.

8. *Id.*

9. 28 U.S.C. § 2671 (1988 & Supp. IV 1992).

10. *Streidel*, 329 Md. at 535, 620 A.2d at 906.

11. *Id.*

12. *Id.*

13. Section 11-108(b) of the Courts and Judicial Proceedings Article provides that "[i]n any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000." MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (1989).

both parents should not exceed the $350,000 statutory cap.[14] The Court of Appeals for the Fourth Circuit certified to the Maryland Court of Appeals the question of "[w]hether the Maryland solatium cap of $350,000 is applicable to each claimant of solatium, or is [it] a comprehensive overall solatium maximum applicable only once, no matter how many claimants there are."[15]

As a threshold matter, the United States argued that based on the Court of Special Appeals's holding in *Potomac Electric Power Co. v. Smith*,[16] section 11-108 of the Courts and Judicial Proceedings Article applied to wrongful death actions.[17] It contended that the damages recoverable in a wrongful death action are for the "personal injuries" suffered by the survivors and that, therefore, the cap should apply to wrongful death actions.[18] Finally, it argued that the cap should be applied in the aggregate to all the claimants in a wrongful death action.[19]

The plaintiffs maintained that the cap should not apply at all in wrongful death actions.[20] They based their argument on the theory that the statutory phrase "personal injury" does not include the sort of harms suffered by claimants in a wrongful death action.[21] The plaintiffs also argued that the Wrongful Death Act[22] provides for damages that differ from those available in an action for personal injury.[23] In an argument the court found persuasive, the plaintiffs pointed out that section 11-109 of the Courts and Judicial Proceedings Article requires juries to itemize the award of damages,[24] but that such itemization is not necessary in wrongful death actions.[25] Consequently, the plaintiffs reasoned that the legislature must not have intended for the

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14. *Streidel*, 329 Md. at 535, 620 A.2d at 907.

15. *Id.*, 620 A.2d at 906.

16. 79 Md. App. 591, 558 A.2d 768, *cert. denied*, 317 Md. 393, 564 A.2d 407 (1989), *overruled by* United States v. Streidel, 329 Md. 533, 620 A.2d 905 (1993).

17. *Streidel*, 329 Md. at 535, 620 A.2d at 907.

18. *Id.* at 536, 620 A.2d at 907.

19. *Id.*

20. *Id.*

21. *Id.*

22. MD. CODE ANN., CTS. & JUD. PROC. §§ 3-901 to -903 (1989).

23. *Streidel*, 329 Md. at 536, 620 A.2d at 907. *See generally* Stewart v. United Elec. Co., 104 Md. 332, 339-40, 65 A. 49, 52 (1906) (discussing the difference between wrongful death actions and survival actions and noting that "[u]nder the Act of 1852 the damages recoverable are such as the equitable plaintiffs have sustained *by the death* of the party injured; under *sec. 103* the damages recoverable are only such as the deceased sustained in his lifetime and consequently exclude those which result to other persons from his death").

24. *Streidel*, 329 Md. at 536, 620 A.2d at 907.

25. *Id.*

cap on noneconomic damages to apply to wrongful death actions.[26] The plaintiffs also argued that, even if the court were to determine that Maryland's cap on noneconomic damages did apply to wrongful death actions, it should apply the cap to each claimant individually, and not in the aggregate.[27]

The court chose not to answer the certified question, holding the damages cap in section 11-108 of the Courts and Judicial Proceedings Article inapplicable to wrongful death actions.[28] Resolving this issue, the court believed, rendered the certified question nondeterminative.[29]

2. Legal Background.—In 1986, the General Assembly adopted $350,000 as the maximum amount recoverable for noneconomic damages in personal injury actions.[30] It also created a procedure for itemizing such awards.[31] The reasons for "capping" the amount recoverable in such cases included a desire to make damages predictable and to encourage the provision of insurance to Maryland consumers.[32] Reacting to a generally perceived "insurance crisis,"[33] Maryland's lawmakers sought to limit the area of damages perceived to be most resistant to objective valuation and the most susceptible to emotion.[34]

Courts have applied this statute in a number of cases. In *Franklin v. Mazda Motor Corp.*,[35] for example, the United States District Court for the District of Maryland held that the statutory cap did not violate the right to a jury trial[36] or the separation of powers doctrine.[37] The

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26. *Id.*

27. *Id.*

28. *Id.* at 537, 620 A.2d at 907.

29. *Id.* at 537 n.3, 620 A.2d at 907 n.3.

30. *See* MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (1989).

31. "As part of the verdict in any action for damages for personal injury . . . the trier of fact shall itemize the award to reflect the monetary amount intended for: (1) Past medical expenses; (2) Future medical expenses; (3) Past loss of earnings; (4) Future loss of earnings; (5) Noneconomic damages; and (6) Other damages." MD. CODE ANN., CTS. & JUD. PROC. § 11-109(b) (1989).

32. *See* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1328 (D. Md. 1989) (noting that the Governor's Task Force to Study Liability on Medical Malpractice Insurance reported that a "ceiling on noneconomic damages will . . . lend greater stability to the insurance market and make it more attractive to underwriters").

33. *Streidel*, 329 Md. at 549, 620 A.2d at 913.

34. *See Franklin*, 704 F. Supp. at 1328.

35. 704 F. Supp. 1325 (1989).

36. *Id.* at 1334. The *Franklin* plaintiffs argued that because the issue of damages for pain and suffering was a question of fact for the jury, the legislature's enactment of § 11-108 impinged upon the constitutional right to a jury trial. *Id.* at 1329.

court applied the rational basis test in determining that the cap was not unconstitutional.[38]

In *Potomac Electric Power Co. v. Smith*,[39] the Court of Special Appeals also applied the rational basis test[40] in ruling that the cap did not violate the right to equal protection,[41] the right to trial by jury,[42] or the right to due process.[43] *Potomac Electric* involved a wrongful death action brought by the parents of a child who was electrocuted and killed when she came into contact with an improperly maintained power line.[44] The Court of Special Appeals based its holding that the noneconomic damages cap applied to this wrongful death action on the fact that the Wrongful Death Act was amended in 1969 to include nonpecuniary damages.[45] The court further noted that most of the parents' damages were noneconomic damages.[46] Stating that "[t]hese damages are those that are traditionally associated with personal injury actions,"[47] the court reasoned that "[t]he fact that such injuries are sustained by beneficiaries who have not sustained bodily injury is not decisive."[48] Relying on a definition from Black's Law Dictionary, the *Potomac* court interpreted the phrase "personal injury" broadly, as it believed the General Assembly intended.[49]

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37. *Id.* at 1336. The plaintiffs also argued that by determining the amount of damages for pain and suffering, the legislature had usurped a judicial function and violated the doctrine of separation of powers. *Id.*

38. *Id.* at 1337. The court concluded that "imposing an economic limitation on damages . . . is reasonably related" to the legislative goals of reducing uncertainty in damage awards and increasing the availability of insurance in Maryland. *Id.*

39. 79 Md. App. 591, 558 A.2d 768, *cert. denied*, 317 Md. 393, 564 A.2d 407 (1989), *overruled by* United States v. Streidel, 329 Md. 533, 620 A.2d 905 (1993).

40. *See id.* at 632 n.12, 558 A.2d at 789 n.12.

41. *Id.* at 633-35, 558 A.2d at 789-90.

42. *Id.* at 628, 558 A.2d at 787.

43. *Id.* at 630, 558 A.2d at 789.

44. *Id.* at 597, 558 A.2d at 771.

45. *Id.* at 620, 558 A.2d at 783.

46. *Id.* at 620-21, 558 A.2d at 783.

47. *Id.* at 621, 558 A.2d at 783.

48. *Id.*

49. *Id.* at 621-22, 588 A.2d at 783-84. Black's Law Dictionary defines personal injury as,

> [i]n a narrow sense, a hurt or damage done to a man's person, such as a cut or bruise, a broken limb, or the like, as distinguished from an injury to his property or his reputation. The phrase is chiefly used in this connection with actions of tort for negligence and under workers' compensation statutes. But the term is also used (chiefly in statutes) in a much wider sense, and as including any injury which is an invasion of personal right, and in this signification it may include such injuries to the person as libel or slander, criminal conversations, malicious prosecution, false imprisonment, and mental suffering.

BLACK'S LAW DICTIONARY 707 (5th ed. 1979).

In 1990, the United States District Court for the District of Maryland, in *Simms v. Holiday Inns, Inc.*,[50] agreed that Maryland's cap on noneconomic damages should apply to wrongful death actions.[51] In addition, it held that Maryland courts would apply the cap to wrongful death actions such that the total amount recoverable by all parties would be limited to $350,000.[52]

In *Bartucco v. Wright*,[53] however, the United States District Court for the District of Maryland ruled that the cap applied individually to each plaintiff in a wrongful death action.[54] *Bartucco* was a wrongful death action brought by the parents of the deceased in which each parent was awarded $300,000 in noneconomic damages.[55] The court based its denial of the defendants' motion to reduce the jury verdict pursuant to Maryland's cap on noneconomic damages on a number of factors, including the difficulty of having a jury consider each plaintiff's injury separately.[56] The court also noted that the two statutes—the wrongful death statute and the damage cap statute—allow for different types of damages to be awarded.[57]

One year later, in *United States v. Searle*,[58] the Court of Appeals first evidenced a reluctance to answer the question of whether the cap applied in the aggregate to wrongful death claimants. The cause of action in *Searle* arose prior to the adoption of the cap.[59] The court reviewed an unpublished decision of the United States Court of Appeals for the Fourth Circuit on the case,[60] which held that the cap

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50. 746 F. Supp. 596 (D. Md. 1990).

51. *Id.* at 597.

52. *Id.*

53. 746 F. Supp. 604 (D. Md. 1990).

54. *Id.* at 612.

55. *Id.* at 605.

56. *Id.* at 608.

57. *Id.* at 607-08. The court stated:

> The two statutes contain different descriptions of the damages involved. In the damage cap statute, the term "noneconomic damages" is defined to include "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury." These are the types of damages typically sustained by a party who, himself or herself, has been directly injured by a defendant. On the other hand, in a wrongful death action, the plaintiffs may recover for "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, attention, advice, counsel, training, or guidance." These are the types of damages typically sustained by a plaintiff due to a defendant's wrongfully causing the death of a family member.

Id. (citations omitted).

58. 322 Md. 1, 584 A.2d 1263 (1991).

59. *Id.* at 4, 584 A.2d at 1264.

60. Searle v. United States, No. 88-2975, 1990 WL 33947 (4th Cir. Mar. 9, 1990).

should be applied in the aggregate.[61] Noting that the statute specifically stated that it applied "[i]n any action for damages for personal injury in which the cause of action [arose] on or after July 1, 1986,"[62] however, the Court of Appeals held that the statute applied prospectively, not retroactively, and refused to reach the issue of whether the cap applied in the aggregate or to each claimant.[63]

Most recently, in *Murphy v. Edmonds*,[64] the Court of Appeals applied the rational basis test to find that the statutory cap did not violate the Maryland or United States constitutions.[65] Judge Chasanow, however, wrote a strong dissent, sounding a number of themes which he would later echo in his concurring opinion in *Streidel*.[66] Judge Bell noted in *Owens-Illinois Inc. v. Zenobia*,[67] that *Murphy* represented part of a trend to limit the recovery available to Maryland tort victims.[68]

3. The Court's Reasoning.—The *Streidel* court began by examining the language of sections 11-108 and 11-109 of the cap statute.[69] The court placed particular emphasis on the meaning of the term "personal injury."[70] Although it admitted that "[t]he death of a victim as a result of a 'personal injury' or 'injury' is, of course, the ultimate injury to that victim,"[71] the court interpreted "personal injury" as not including the injuries suffered by the claimants in a wrongful death action.[72] Noting that the damages recoverable in a survival action for personal injuries differ from those available in an action for wrongful death,[73]

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61. *See Searle*, 322 Md. at 4, 584 A.2d at 1264.

62. *Id.* at 5, 584 A.2d at 1265 (quoting § 11-108(b) of the Courts and Judicial Proceedings Article).

63. *Id.* at 6, 584 A.2d at 1265.

64. 325 Md. 342, 601 A.2d 102 (1992). *See generally* Lynn A. Dymond, Note, *The Constitutionality of Maryland's Non-economic Damage Cap*, 52 MD. L. REV. 545 (1993) (reviewing the court's decision in *Murphy*).

65. *Murphy*, 325 Md. at 361-62, 601 A.2d at 111-12.

66. *See id.* at 378-79, 601 A.2d at 120 (Chasanow, J., dissenting) (arguing that "the right to recover full and fair compensation from a tortfeasor is an important personal right" that should be reviewed under intermediate scrutiny and that, except in cases of medical malpractice, would not survive such scrutiny).

67. 325 Md. 420, 601 A.2d 633 (1992). *See generally* Eric B. Bruce, Note, *"Fixing" Punitive Damages and the Advent of State-of-the-Art Knowledge in Maryland*, 52 MD. L. REV. 821 (1993) (discussing *Zenobia* and the history of punitive damages in Maryland).

68. *Zenobia*, 325 Md. at 484 n.5, 601 A.2d at 665 n.5 (Bell, J., concurring and dissenting).

69. *See Streidel*, 329 Md. at 537-39, 620 A.2d at 907-08.

70. *See id.* at 539, 620 A.2d at 909.

71. *Id.*

72. *Id.*

73. *Id.* at 539-40, 620 A.2d at 909. Historically, Maryland courts have held that the causes of action for personal injury and wrongful death are separate and distinct. While a survival action compensates for the victim's own anguish, damages in a wrongful death

the court found that "unless the context indicates otherwise, damages for an 'injury' or a 'personal injury' or a 'bodily injury' do not include those damages recoverable in a wrongful death action."[74] The court reviewed other legislation and found that when the legislature wished to affect the damages recoverable in both personal injury and wrongful death actions, it had used language such as "personal injury, death" or "personal injury, or death" or "personal injury, including death," rather than relying upon the phrase "personal injury" to encompass both meanings.[75] For support, the court cited a number of cases which examined the use of similar language.[76] Noting that the General Assembly was clearly familiar with the more inclusive phrases, the court relied upon the legislature's use of the less inclusive language, "any action for damages for personal injury," to find that the phrase did not include actions for wrongful death.[77]

Maintaining that "[c]ourts ordinarily construe the terms 'personal injury' or 'bodily injury' or 'injury' as not including a wrongful death action,"[78] the Court of Appeals went on to examine several instances in which the court had interpreted the phrase "bodily injury" to include wrongful death actions and distinguished those from *Streidel*.[79] For example, in *Forbes v. Harleysville Mutual*,[80] the Court of Appeals interpreted the Insurance Code's[81] use of the term "bodily injuries sustained in the accident"[82] to include actions for wrongful death.[83] The court examined the context of the entire statute in which that phrase occurred and noted that, in a number of places, the statute

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action are intended to compensate the victim's survivors. *See* Stewart v. United Elec. Light & Power Co., 104 Md. 332, 338-39, 65 A. 49, 52 (1906) (distinguishing survival actions from wrongful death actions).

74. *Streidel*, 329 Md. at 540, 620 A.2d at 909.

75. *Id.* at 541-42, 620 A.2d at 909-10.

76. *See id.* at 540 n.7, 620 A.2d at 909 n.7 (citing Pacific Indem. v. Interstate Fire & Cas., 302 Md. 383, 488 A.2d 486 (1985); Perkins v. Fireman's Fund Indem. Co., 962 P.2d 670 (Cal. Dist. Ct. App. 1941); *In re* Employer's Liab. Assur. Corp., 156 So. 447 (La. 1934); Gaines v. Standard Acc. Ins. Co., 32 So. 2d 633 (La. Ct. App. 1947); Lumbermen's Mut. Cas. Co. v. McCarthy, 8 A.2d 750 (N.H. 1939); Brustein v. New Amsterdam Cas. Co., 174 N.E. 304 (N.Y. 1931); Valdez v. Interinsurance Exch., 54 Cal. Rptr. 906 (1966); Holtz v. Mutual Serv. Cas. Co., 117 N.W.2d 767 (Minn. 1962); Napier v. Banks, 224 N.E.2d 158 (Ohio Ct. App. 1967); Bernat v. Socke, 118 A.2d 253 (Pa. Super. Ct. 1955)).

77. *Id.* at 542-45, 620 A.2d at 910-12.

78. *Id.* at 542, 620 A.2d at 910.

79. *See id.* at 543-44, 620 A.2d at 910-11.

80. 322 Md. 689, 589 A.2d 944 (1991).

81. MD. ANN. CODE art. 48A, § 541(c)(2) (1991).

82. *Id.*

83. *Forbes*, 322 Md. at 700, 589 A.2d at 948.

spoke of "the bodily injury or death of the insured."[84] Additionally, the *Streidel* court acknowledged that in section 9-101 of the Labor and Employment Article, the state's Workers' Compensation Act, the term "accidental injury" is read to include wrongful death.[85] Again examining the context in which that term appears, the court noted that the Act always included a section providing for compensation in the case of the worker's death.[86]

When the court examined the context of the entire cap statute, it found convincing the plaintiffs' argument that the General Assembly did not intend to include wrongful death actions in the cap it placed on the amount recoverable in actions for personal injury.[87] The court noted that the noneconomic damages subject to the cap are of the type normally awarded to the person injured, not to her survivors.[88] Some of the harms mentioned in the statutory cap on noneconomic damages, such as inconvenience, physical impairment, and loss of consortium, are not recoverable in a wrongful death action.[89]

According to the *Streidel* court, the strongest argument against inclusion of wrongful death actions in the cap on personal injury damages is section 11-109's requirement that juries itemize awards to indicate how much has been allocated for past and future medical expenses, past lost earnings, future loss of earnings, noneconomic damages, and other damages.[90] The court again emphasized that these damages are not available in an action for wrongful death.[91] The emphasis in section 11-109 on future payments to compensate the victim for items such as future medical bills and future lost earn-

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84. *Id.* at 699, 589 A.2d at 948-49. Although not relied on by the *Streidel* court, the *Forbes* court also placed heavy emphasis on the policy reasons behind the uninsured motorist provision in the Code—to provide recovery to those harmed. *Id.* at 697, 589 A.2d at 948.

85. *Streidel*, 329 Md. at 543-44, 620 A.2d at 911.

86. *Id.*

87. *Id.* at 544, 620 A.2d at 911.

88. *Id.* The court noted that

> noneconomic damages that are subject to the cap are defined as "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury." . . . These types of damages are associated with personal injury and are awarded to compensate the person injured. They are not designed to compensate the party entitled to damages in a wrongful death case for the loss of the deceased.

Id.

89. *Id.*

90. *Id.*

91. *Id.* at 544-45, 620 A.2d at 911.

ings[92] further convinced the court that the cap statute was "inconsistent with a [sic] award of damages in an action for wrongful death."[93]

Having examined the language and context of the cap statute, the court turned its attention to the legislative history and available indications of legislative intent.[94] It noted that although an extensive legislative history of the cap statute is available, nowhere in the history is there any mention of wrongful death actions.[95] It also noted that the task force reports upon which the legislation was based do not mention wrongful death actions.[96]

The Court of Appeals also found no basis in the legislative history to support the contention of the United States and the Court of Special Appeals that the final version of the statute represented a "broadening" of the proposed legislation and that the General Assembly therefore intended the cap to be applied more expansively.[97] The Court of Appeals traced the legislative history of the cap[98] and rejected the defendant's argument that the legislative purpose of the statute would be thwarted by any interpretation that failed to include wrongful death actions within the provisions of the cap.[99] The court identified "a legislatively perceived crisis concerning the availability and cost of liability insurance in this State"[100] as the underlying reason for the cap on noneconomic damages.[101] The court pointed out that the General Assembly rejected a number of proposals that might have effectively achieved its goal of "limit[ing] the rising cost of [insurance] and . . . ensur[ing] the availability of liability insurance."[102] The court then invoked the time honored principle "that legislative bodies need not and do not 'attack all aspects of a problem at the same time. The legislative body may select one phase of a problem and apply a remedy there, neglecting for the moment other phases of the problem.'"[103] In what may be read as an invitation to the General Assembly, the

92. MD. CODE ANN., CTS. & JUD. PROC. § 11-109(c)-(d).

93. *Streidel*, 329 Md. at 545, 620 A.2d at 911.

94. *See id.*, 620 A.2d at 912.

95. *Id.* at 546, 620 A.2d at 912.

96. *Id.*

97. *Id.* at 546-47, 620 A.2d at 912.

98. *See id.* at 546-49, 620 A.2d at 912-13.

99. *Id.* at 549, 620 A.2d at 913.

100. *Id.* (citations omitted).

101. *Id.*

102. *Id.*

103. *Id.* at 550, 620 A.2d at 914 (quoting Bowie Inn v. City of Bowie, 274 Md. 230, 241, 335 A.2d 679, 686 (1975)).

Streidel court stated that "[a]mending the statute . . . is not the function of the judiciary."[104]

The court also reiterated the difficulties that would arise in providing juries with a procedure for itemizing awards in wrongful death actions[105] and pointed out that, on a number of occasions, it had refused to expand the types of damages available in wrongful death actions.[106] Just as it had refused to expand wrongful death damages without specific authorization from the legislature, the Court of Appeals refused to limit noneconomic damages in wrongful death actions absent specific legislative direction.[107]

Judge Chasanow added a concurring opinion that reads much like a dissent.[108] He reprimanded the court for its use of the rational basis test in *Murphy*,[109] reasserting his position that "the right to recover full and fair compensation from a tortfeasor is an important personal right, and any limitation on that right should be subject to 'heightened' or 'intermediate' scrutiny."[110] Judge Chasanow also pointed out that if Marc Streidel had survived his investigation of the mailbox, no matter how disabled and disfigured he may have been, and regardless of how many years of painful suffering he would have had to endure, he could have recovered no more than $350,000 in noneconomic damages.[111] Simply because Marc's encounter with the mailbox was fatal, Judge Chasanow explained, the majority imposed no limits on the amount of damages that his parents may recover to compensate them for his death.[112] Finding such a result illogical,

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104. *Id.*

105. *See id.* at 551-52, 620 A.2d at 915.

106. *Id.* (citing Smith v. Gray Concrete Pipe Co., 267 Md. 149, 158-59, 297 A.2d 721, 726-27 (1972) (finding that exemplary damages are not available in a wrongful death action), *overruled by* Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992); Baltimore & Ohio R.R. Co. v. Kelly, 24 Md. 271, 280 (1866) (finding that punitive damages were not available in wrongful death actions); Cohen v. Rubin, 55 Md. App. 83, 101-02, 406 A.2d 1046, 1055-56 (1983) (finding that punitive damages were not reasonable under the wrongful death statute)).

107. *Streidel*, 329 Md. at 552, 620 A.2d at 915.

108. *See id.* at 553, 620 A.2d at 915 (Chasanow, J., concurring). Judge Chasanow has consistently opposed the cap because it denies full recovery to those most seriously injured by a tortfeasor. *See* Murphy v. Edmonds, 325 Md. 342, 378-85, 601 A.2d 102, 120-23 (1992) (Chasanow, J., dissenting); United States v. Searle, 322 Md. 1, 584 A.2d 1263 (1991) (majority opinion by Judge Chasanow refusing to give "deference" to cap statute).

109. *See Streidel*, 329 Md. at 553, 620 A.2d at 915 (Chasanow, J., concurring).

110. *Id.* (Chasanow, J., concurring) (quoting *Murphy*, 325 Md. at 379, 601 A.2d at 120 (Chasanow, J., dissenting)).

111. *Id.*, 620 A.2d at 916 (Chasanow, J., concurring).

112. *Id.* at 553-54, 620 A.2d at 916 (Chasanow, J., concurring).

Judge Chasanow repeated his contention that the cap statute denies equal protection of the law to seriously injured tort victims.[113]

Judge Chasanow also indicated that the General Assembly meant the phrase "personal injury" to include actions for wrongful death.[114] He asserted that since a number of cases have held the cap applicable to wrongful death actions,[115] the legislature had "acquiesced" to the holdings of those cases by its inaction.[116] Judge Chasanow concluded by stating that:

> [t]he majority's holding that the cap statute limits recovery for the pain, anguish, and suffering of primary tort victims, but permits unlimited recovery for the pain and anguish of secondary tort victims, only reinforces my view that, except in medical malpractice cases, the cap statute denies severely injured tort victims equal protection of law.[117]

4. Analysis.—In *Streidel*, the Court of Appeals engaged in classic statutory construction to determine that the cap on noneconomic damages for personal injuries does not apply in wrongful death actions. Key to the court's decision were two factors: the different types of damages available in actions for personal injury and actions for wrongful death,[118] and the difficulty of having the jury in a wrongful death case itemize the award as called for in the cap statute.[119]

The *Streidel* court overruled the Court of Special Appeals's decision in *Potomac Electric Power Co. v. Smith*.[120] The *Potomac Electric* court interpreted the phrase "personal injury" broadly.[121] As the *Streidel* court pointed out, however, the General Assembly could have used

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113. *Id.* at 554, 620 A.2d at 916 (Chasanow, J., concurring).

114. *Id.* (Chasanow, J., concurring).

115. *Id.* at 554-55, 620 A.2d at 916 (Chasanow, J., concurring); *see* Searle v. United States, No. 88-2975, 1990 WL 33947 (4th Cir. Mar. 9, 1990) (unpublished opinion); Bartucco v. Wright, 746 F. Supp. 596 (D. Md. 1990); Potomac Elec. Power Co. v. Smith, 79 Md. App. 591, 619-23, 558 A.2d 768, 783-85, *cert. denied*, 317 Md. 393, 564 A.2d 407 (1989), *overruled by* United States v. Streidel, 329 Md. 533, 620 A.2d 905 (1993). *But see Streidel*, 329 Md. at 550 n.12, 620 A.2d at 914 n.12 (noting that "[t]he statutory construction principle relied on by Judge Chasanow . . . has little or no applicability when the judicial construction of the statute is not by the highest court of the jurisdiction involved" and pointing out that none of the cases cited by Judge Chasanow were decided by the Court of Appeals).

116. *Streidel*, 329 Md. at 555, 620 A.2d at 916 (Chasanow, J., concurring).

117. *Id.*, 620 A.2d at 917 (Chasanow, J., concurring).

118. *See id.* at 544, 620 A.2d at 911; *see supra* notes 73-74 and accompanying text.

119. *See Streidel*, 329 Md. at 551-52, 620 A.2d at 915; *see supra* note 90 and accompanying text.

120. 79 Md. App. 591, 558 A.2d 768, *cert. denied*, 317 Md. 393, 564 A.2d 407 (1989), *overruled by* United States v. Streidel, 329 Md. 533, 620 A.2d 905 (1993).

121. *See id.* at 622, 558 A.2d at 784.

language that would have clearly indicated an intent to include wrongful death actions within the cap.[122] Its use of a more restrictive phrase is persuasive evidence that the legislature never intended the broad application that the Court of Special Appeals employed.

In *Potomac Electric*, the court grappled unsuccessfully with the very problem that convinced the Court of Appeals to find the cap inapplicable to wrongful death actions—the difficulty of itemizing damages.[123] If the cap were held to apply in the aggregate in *Streidel*, the court would have had to determine a procedure for itemizing the total amount of damages. The Court of Special Appeals was able to avoid that issue in *Potomac Electric* because the plaintiffs there agreed to a lump sum jury verdict before trial.[124] Thus, the issue of whether the cap applied in the aggregate had not been properly preserved for appeal.[125] The issue would not have remained unresolved for long, however. Sooner or later, Maryland courts would have had to determine how to itemize and allocate a capped wrongful death award for noneconomic damages among several claimants. When the mother of several children is killed in a car accident, do her children suffer any less than an only child of a deceased mother? There is no clear answer to such a question, and the *Streidel* court wisely avoided the folly of attempting to provide one.

Although Judge Chasanow's point concerning the somewhat anomalous results to which the application of this decision might lead[126] is noteworthy, the Court of Appeals's decision is well supported by legislative history as well as logic. Moreover, as the court pointed out, it is not the function of the judiciary to amend the laws to ensure that they are completely effective or consistent.[127] Rather, the General Assembly, if still concerned with the "insurance crisis," may elect to place a cap on the amount recoverable in noneconomic damages in wrongful death actions. If it does, however, it should indicate whether and how it wishes judges and juries to itemize such awards, and whether or not the cap applies in the aggregate or to each claim-

122. *Streidel*, 329 Md. at 541-42, 620 A.2d at 909-10.

123. *See Potomac Elec.*, 79 Md. App. at 625, 558 A.2d at 785 (noting the difficulty of determining the individual breakdown of the jury award). Damages would have been particularly difficult to itemize in *Potomac Electric* because the decedent's parents were not married and decedent lived with her mother. *See id.* at 625 n.18, 558 A.2d at 785 n.18; *see also Streidel*, 329 Md. at 551-52, 620 A.2d at 915 (discussing the difficulty of itemizing damages in a wrongful death action).

124. *Potomac Elec.*, 79 Md. App. at 624, 558 A.2d at 785.

125. *Id.*

126. *See Streidel*, 329 Md. at 553-54, 620 A.2d at 916 (Chasanow, J., concurring); *see supra* notes 111-113 and accompanying text.

127. *Streidel*, 329 Md. at 550, 620 A.2d at 914.

ant individually.[128] A per person cap might, even at the cost of predictability, prove more workable and less open to speculation and emotion than an aggregate cap.[129] A per person cap also would avoid the injustice of reducing the award of a wrongful death claimant simply because other claimants exist.[130] Although it may be rational to limit the amount of damages available for harm such as noneconomic injuries, which are difficult to value,[131] it hardly seems just to decrease compensation simply because others have suffered a similar loss.

5. Conclusion.—The *Streidel* court chose to avoid the question certified to it by the United States Court of Appeals for the Fourth Circuit—whether Maryland's statutory cap on noneconomic damages in personal injury cases is to be applied to each individual claimant or in the aggregate. Instead, the court held that the cap does not apply to wrongful death cases. Although this decision may lead to the strange results set forth in Judge Chasanow's concurring opinion, the Court of Appeals correctly left any necessary adjustment for the legislature.

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128. *See id.* at 537, 620 A.2d at 907; United States v. Searle, 322 Md. 1, 6, 584 A.2d 1263, 1265 (1991) (both declining to answer the question of whether the cap should be applied in the aggregate).

129. *See generally* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1328 (D. Md. 1989), in which the court noted that

> [t]he translation of [noneconomic] losses into dollar amounts is an extremely subjective process as these claims are not easily amenable to accurate, or even approximate, monetary valuation. There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. They vary substantially from person to person, even when applied to similar cases or similar injuries, and can be fabricated with relative ease.

Id. See also Bartucco v. Wright, 746 F. Supp. 604, 609 n.11 (D. Md. 1990) ("[T]his Court understands the legislature's motivation to have been to foster predictability, not simply to limit recovery. . . . [P]redictability per se is fostered equally well by a single cap or individual caps.").

130. *See Bartucco*, 746 F.2d at 610 (noting that if the cap were applied in the aggregate, the recovery of a plaintiff "would be affected fortuitously by circumstances relating solely to the cause of action of another person").

131. *See Franklin*, 704 F. Supp. at 1328 (finding that a cap on noneconomic damages "will help contain rewards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, lend to more settlements, and enable insurance carriers to set more accurate rates because of greater predictability of the size of judgments").

B. Clarifying the Fair Report Privilege

In *Rosenberg v. Helinski*,[1] the Court of Appeals considered whether expert witnesses may lawfully repeat their defamatory in-court testimony to the public. The court held that participants or witnesses in judicial proceedings enjoy a qualified immunity to report their observances to others outside the courtroom.[2] In reaching this conclusion, the court reaffirmed and clarified Maryland's common law fair report privilege to defame, thereby upholding the Constitution's First Amendment guarantees.[3]

1. The Case.—On July 26, 1985, Mr. and Mrs. Helinski attended a custody hearing in the Circuit Court for Baltimore County to determine visitation rights for their child.[4] At the proceeding, Mrs. Helinski opposed her husband's request for unsupervised visits with the couple's two-year-old daughter Jackie on the grounds that Mr. Helinski had sexually abused the child.[5] Dr. Charles Shubin, a pediatrician at Mercy Hospital, testified in support of Mrs. Helinski, revealing that he had discovered a scar on Jackie's genitalia when examining her.[6] He linked this type of injury to past sexual abuse.[7] The trial court, however, found no decisive evidence linking Mr. Helinski to the sexual injury and awarded him unsupervised visitation rights.[8]

On August 20, 1985, the court convened to reconsider the mother's claim that her husband should be denied unsupervised visits with their child.[9] At this hearing, Dr. Leon Rosenberg, Ph.D., a child psychologist at the Johns Hopkins School of Medicine, testified on Mrs. Helinski's behalf that Jackie had expressed fear of her father because he had molested her.[10] Based on Dr. Rosenberg's testimony,

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1. 328 Md. 664, 616 A.2d 866 (1992), *cert. denied*, 113 S. Ct. 3041 (1993).

2. *Id.* at 677, 687, 616 A.2d at 872, 877.

3. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

4. *Helinski*, 328 Md. at 668, 616 A.2d at 868.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 668-69, 616 A.2d at 868. After the July 26th hearing, Mrs. Helinski petitioned the court to revise its decision allowing her husband unsupervised visits with their daughter. *Id.* at 668, 616 A.2d at 868. She also refused to comply with the July 26th order. *Id.* Mr. Helinski then filed a motion for the court to find his wife in contempt. *Id.*

10. *Id.* at 669, 616 A.2d at 868. Dr. Rosenberg examined the child three times—once alone and twice in the presence of Mrs. Helinski. *Id.* After observing the child's spontaneous behavior and drawings, Dr. Rosenberg concluded that the evidence of child abuse

the trial court ordered psychiatric evaluations of the Helinskis and suspended judgment on the custody issue until the examination results could be assessed.[11]

Immediately after the hearing, WJZ, a local television station, filmed an interview with Dr. Rosenberg on the courthouse steps.[12] In response to questions from the station's reporter, the doctor repeated his courtroom testimony.[13] That night, WJZ's six o'clock news report aired a story about the trial, interspersing three of the doctor's statements from the filmed interview: (1) "'The child talked very directly about being hurt by her father and she talked about being hurt by her father in the genital area'"; (2) "'And when she finally talked about being hurt, she expressed real fear, real anxiety, and two-and-a-half year old child[ren] cannot playact that well. It's beyond them'"; and (3) "'Whatever did occur was frightening, but it looked like it was time-limited and I think we have a very good chance of, ah, overcoming any negative effects.'"[14] The eleven o'clock news ran an edited version of the six o'clock story, which only included the doctor's first statement about the child's admission that her father had molested her.[15]

Mr. Helinski then filed suit in the Circuit Court for Baltimore City, alleging that Dr. Rosenberg had defamed him by repeating his in-court testimony to the television reporter.[16] In response, Dr. Rosenberg moved for summary judgment under rule 2-501.[17] At a motions hearing on December 13, 1990, circuit court Judge John Carroll Byrnes granted the doctor's motion for dismissal, reasoning that the doctor's comments were privileged because they only repeated his in-court testimony.[18] The judge refused to admit testimony from Helinski's expert witness, Dr. Shapiro, about the proper standard of care for

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from her father was "'extremely clear.'" *Id.* The doctor's conclusion also was based on a family history provided by Mrs. Helinski, Dr. Shubin's findings, and telephone conversations with Dr. Shubin and a social worker who had examined the child. *Id.*, 616 A.2d at 869. The social worker, after observing Jackie's play with lifelike dolls, had concluded that Jackie had been abused by Mr. Helsinki. *Id.* Before conducting his evaluation, Dr. Rosenberg was also aware of the court's July 26th ruling. *Id.* at 670, 616 A.2d at 869.

11. *Id.* at 670, 616 A.2d at 869.

12. *Id.*

13. *Id.* at 671, 616 A.2d at 869.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 672, 616 A.2d at 870; *see* MD. R. 2-501 (governing motions for summary judgment).

18. *Helinski*, 328 Md. at 672, 616 A.2d at 870. Judge Byrnes explained that Rosenberg was "'merely recounting what he had already said in a public, and privileged, forum. What he recounted was not false. . . . [His] evaluation . . . could not be made false, merely

psychiatric evaluations.[19] Thus, the court found no evidence that Dr. Rosenberg had acted with negligence, ill-will, or "actual malice"[20] in evaluating the child or in repeating his testimony.[21]

The Court of Special Appeals reversed the circuit court's dismissal and remanded the case to the trial court for further proceedings.[22] In his opinion, Judge Alpert first concluded that the circuit court erred in failing to admit Dr. Shapiro's testimony regarding Rosenberg's alleged negligence.[23] Judge Alpert further reasoned that the fair report privilege extends to any individuals who offer defamatory in-court testimony and later repeat that testimony outside the courtroom.[24] Using section 611 of the *Restatement (Second) of Torts* as a guide,[25] the court held that to maintain the fair report privilege, an individual must (1) give a fair and accurate report and (2) refrain from deliberately misusing the privilege in order to harm another person.[26] Therefore, the intermediate court implicitly directed the trial court to assess, on remand, whether Dr. Rosenberg abused this conditional privilege when he spoke to the WJZ reporter.[27]

The Court of Appeals granted certiorari to decide whether Dr. Rosenberg's statements outside the courtroom were protected by the fair report privilege.[28]

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because Judge Jacobson was not convinced in a judicial tribunal, that Mr. Helinski did not do what he was accused of doing.'" *Id.*

19. *Id.* at 673, 616 A.2d 870. Helinski argued that Rosenberg's evaluation of Jackie was not thorough enough to warrant a conclusion that her father had sexually abused her. *Id.* Judge Byrnes declined to hear Shapiro's testimony because Shapiro was not trained in the field of child sexual abuse. *Id.*

20. *See infra* note 42-44 and accompanying text.

21. *Helinski*, 328 Md. at 672-73, 616 A.2d at 670.

22. Helinski v. Rosenberg, 90 Md. App. 158, 600 A.2d 882, *rev'd*, 328 Md. 664, 616 A.2d 866 (1992), *cert. denied*, 113 S. Ct. 3041 (1993).

23. *Id.* at 170, 600 A.2d at 888.

24. *Id.* at 175, 600 A.2d at 891.

25. Section 611 of the *Restatement* states: "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." RESTATEMENT (SECOND) OF TORTS § 611 (1977).

26. *Helinski*, 90 Md. App. at 175, 600 A.2d at 891.

27. *Helinski*, 328 Md. at 673-74, 616 A.2d at 870.

28. *Id.* at 674, 616 A.2d at 871.

2. *Legal Background.—*

a. *The Tort of Defamation.—*

(1) At Common Law.—The tort of defamation[29] safeguards individuals' interests in their reputations.[30] At common law, actionable defamation resulted from "falsehoods communicated (published) by the actor about another (the victim of the defamation) to one or more third persons, tending to injure the reputation of the victim."[31] Once plaintiffs established the defamatory nature of the comments, they did not need to prove resulting damage; rather, courts presumed injury to reputation from defamatory statements.[32] Accordingly, courts allowed plaintiffs to recover presumed damages if they could demonstrate that the comments at issue were (1) untrue, (2) defamatory, and (3) published.[33]

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29. Defamation encompasses both libel and slander. Libel is traditionally written or visible, and slander is generally oral or communicated to a small number of people. Kathryn D. Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 471 n.1 (1979). *See also* RESTATEMENT (SECOND) OF TORTS § 568, cmt. b (1977), which provides:

> It is impossible to define and difficult to describe with precision the two forms of defamation, slander and libel. Oral defamation is tortious if the words spoken fall within a limited class of cases in which the words are actionable per se, or if they cause special damages. Written defamation is actionable per se. For two centuries and a half the common law has treated the tort of defamation in two different ways on a basis of mere form. Yet no respectable authority has ever attempted to justify the distinction on principle; and in the modern times, many courts have condemned the distinction as harsh and unjust.

Id.

30. 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 5, at 24 (2d ed. 1986); *see also* LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION § 3, at 4 (1978) ("In many cases the primary, if not the sole, purpose of an action for defamation is vindication of the plaintiff's good name.").

31. 2 HARPER ET AL., *supra* note 30, § 5, at 3.

32. *Id.* Once a libelous statement was found to be defamatory, state courts did not require plaintiffs to prove damage from the falsehoods. *Id.* § 5.9, at 78. Rather, damages were presumed because the subtle nature of libel's effect made it difficult for a plaintiff to show a causal connection between the damaged reputation and the defamatory comments. *See id.* § 5.30, at 253. On the other hand, under slander law, presumed damages were awarded only for comments that were slanderous *per se*—comments alleging that someone had (1) committed criminal acts, (2) contracted a venereal or vile communicable disease, (3) engaged in unprofessional conduct, or (4) in the case of women, acted unchastely. *Id.* § 5.9, at 79; *see* Leese v. Baltimore County, 64 Md. App. 442, 497 A.2d 159, *cert. denied*, 305 Md. 106, 501 A.2d 845 (1985) (noting that comments imputing criminal or unprofessional activity to the plaintiff are defamatory per se); *see also* RESTATEMENT OF TORTS § 621 (1938).

All other slanderous comments were actionable only if the plaintiffs could prove special damages—material or pecuniary loss—beyond injury to reputation or emotional distress. RESTATEMENT (SECOND) OF TORTS § 575 & cmt. b (1977).

33. 2 HARPER ET AL., *supra* note 30, § 5.0, at 3.

Defendants had little hope of defending themselves against allegations of defamation. Even individuals who merely repeated defamatory comments could not escape liability; publishers and republishers alike risked suit.[34] In fact, regardless of the particular circumstances of the case or the intent of the defending parties, courts held actors strictly liable unless they proved the truth of their statements or possessed a privilege to defame.[35]

(2) Constitutional Overlay.—The common law tort of defamation necessarily limited the guarantees afforded by the First Amendment.[36] Individuals and the press were free to exercise their rights to free speech only so long as they did not impermissibly impugn another's reputation.[37] Concerned that common law defamation unduly restricted the Constitution by causing the media and private individuals to engage in self-censorship, thereby inhibiting the free exchange of ideas in society,[38] the Supreme Court began in 1964 to evaluate and revise the required elements of common law defamation and to negotiate the proper balance between individuals' interests in protecting their reputations and First Amendment rights.[39]

The Court first altered the common law by introducing the constitutional malice standard. In *New York Times v. Sullivan,*[40] a public official sued the *New York Times* for defamatory statements regarding actions that he had taken in his official capacity.[41] The Supreme Court held that to prevail in a defamation action, a public official must demonstrate that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[42] In *Curtis Publishing Co. v. Butts,*[43] the

34. *See* Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1298 (D.C. Cir.), *cert. denied,* 488 U.S. 825 (1988) ("The common law of libel has long held that one who republishes a defamatory statement 'adopts' it as his own, and is liable in equal measure to the original defamer.") (citations omitted)).

35. 2 HARPER ET AL., *supra* note 30, § 5.0, at 3.

36. *Id.* § 5.1, at 26.

37. *See supra* notes 31-35 and accompanying text.

38. *See* Gooch v. Maryland Mechanical Sys., Inc., 81 Md. App. 376, 388, 567 A.2d 954, 960, *cert. denied,* 319 Md. 484, 573 A.2d 807 (1990) (explaining that in revising state defamation law, the Supreme Court "extoll[ed] our national commitment to uninhibited debate on public issues and express[ed] its fear that the [state] law would result in overextensive media self-censorship").

39. Sowle, *supra* note 29, at 488. The Court felt that imposing liability despite good faith intentions impermissibly limited the freedoms of speech and the press. *Id.*

40. 376 U.S. 254 (1964).

41. *Id.* at 256.

42. *Id.* at 279-80; *see also* Harte-Hanks Communication, Inc. v. Connaughton, 491 U.S. 657, 666 n.7, 667 (1989) (asserting that "'actual malice' . . . has noting to do with bad motive or ill will" but instead constitutes "a reckless disregard for the truth"); St. Amant v.

Court extended the "actual malice" standard to public figures.[44] It supported its abandonment of the strict liability standard for falsehoods concerning the professional conduct of public officials and public figures by declaring that the First Amendment protects the free debate about public issues and ideas that is necessarily a part of a democratic society.[45] As the Court stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[46]

The Supreme Court also reformulated the standards applicable to private party plaintiffs. In *Gertz v. Robert Welch, Inc.*,[47] the Court established that as long as states did not choose strict liability, they could decide individually upon the proper standard of liability for communications of defamatory comments against private citizens.[48] The Court, however, restricted awards to actual damages, mandating that in order to collect presumed and punitive damages, plaintiffs must demonstrate constitutional malice.[49] The Court regarded its de-

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Thompson, 390 U.S. 727, 731 (1968) (defining reckless disregard as "serious doubts as to the truth"). The *Sullivan* standard represented a balance between the state's interest in protecting public figures from defamation and First Amendment concerns. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-47 (1974) (adjusting the standard to balance the interests of private individuals in defamation suits).

43. 388 U.S. 130 (1967).

44. *See id.* at 164. The Court explained that public figures are individuals who are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.*

45. *See Sullivan*, 379 U.S. at 270 ("The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'") (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

46. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). The Court has acknowledged that some erroneous statements of fact must be tolerated to promote dissemination of information about the government. *Sullivan*, 376 U.S. at 271-75.

47. 418 U.S. 323 (1974).

48. *Id.* at 346-47. Because the Court ruled out the possibility of fault-free liability, the *Gertz* decision left states with a choice between a negligence standard and the more demanding constitutional malice requirement described in *Sullivan*. *See supra* note 42 and accompanying text (describing the malice requirement).

The Court's decision in *Gertz* also rejected the premise underlying the plurality opinion in Rosenbloom v. Metromedia, 403 U.S. 29 (1970). In *Rosenbloom*, the Court formulated a "public or general interest" test requiring private individuals to prove constitutional malice if the defamatory communications contained material relating to a public concern. *Id.* at 52. The *Gertz* Court reasoned that private individuals deserve more protection than public persons because private individuals have less access to the media and, therefore, have fewer opportunities to refute any allegations against them. *Gertz*, 418 U.S. at 344. In addition, the Court noted that public officials and public figures tacitly consent to the risk of defamation when they enter into the public forum. *Id.* at 345.

49. *Gertz*, 418 U.S. at 349. The Court did not define actual damage, but indicated that it encompassed more than monetary loss, defining it as "the more customary types of actual harm inflicted by defamatory falsehood includ[ing] impairment of reputation and

cision as a balance because "[i]t recognize[d] the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shield[ed] the press and broadcast media from the rigors of strict liability for defamation."[50]

(3) Maryland Law.—In light of the Supreme Court's constitutional mandates, the Court of Appeals revised Maryland's defamation law in *Jacron Sales Co. v. Sindorf*.[51] Extending the *Gertz* rationale to nonmedia contexts,[52] the court held that a negligence standard applies in cases "brought by private persons regardless of whether the subject matter of the defamation is one of public or general interest."[53] To recover compensatory damages under the so-called "*Jacron* Rule," a private plaintiff must prove that the publication was (1) defamatory, (2) false, (3) caused by the defendant's negligence, and (4) harmful to the plaintiff.[54] The court further explained that since plaintiffs have to prove falsity in order to establish negligence, defendants no longer need to prove truth as an affirmative defense.[55]

b. The Fair Report Privilege.—While the Supreme Court's constitutional interpretations of defamation law obviated the defendant's need to demonstrate veracity,[56] the common law privileges associated with defamation remained intact.[57] The privilege defense arose from the basic tort notion that "although sound policy requires that certain general types of conduct be made the basis for legal liability, there are exceptional circumstances where persons engaging in such conduct

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standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

50. *Id.* at 348.

51. 276 Md. 580, 350 A.2d 688 (1976).

52. *Id.* at 590-92, 350 A.2d at 694-95.

53. *Id.* at 590, 350 A.2d at 694. In defining the standard, the *Jacron* court adopted RESTATEMENT (SECOND) OF TORTS § 580 (1977). *Id.* at 596, 350 A.2d 688. The *Restatement* states:

> One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> (a) Knows that the statement is false and that it defames another,
>
> (b) Acts in reckless disregard of these matters, or
>
> (c) Acts *negligently* in failing to ascertain them.

RESTATEMENT (SECOND) OF TORTS § 580B (1977) (emphasis added).

54. *Jacron*, 276 Md. at 596-97, 350 A.2d at 697-98; *see also* Hearst Corp. v. Hughes, 297 Md. 112, 122-23, 466 A.2d 486, 491 (1983) (diagramming the revised elements of defamation).

55. *Jacron*, 276 Md. at 597, 350 A.2d at 698.

56. *See* 2 HARPER ET AL., *supra* note 30, § 5, at 3-5.

57. *See generally id.* § 5.21 (discussing the privilege defense).

should be protected."[58] Accordingly, defamation law refuses to grant relief for harm to reputation in instances where society's interests override individuals' interests in receiving redress.[59] Courts recognize two classifications of privileges: (1) absolute privileges, which grant unqualified immunity, and (2) qualified privileges, which provide limited protection to the defamer.[60]

In Maryland, courts recognize an absolute privilege for judges, attorneys, parties, and witnesses who communicate defamatory testimony during the course of a judicial proceeding.[61] These persons cannot be held liable for their defamatory communications as long as they confine these comments to the bounds of the privileged forum.[62] This immunity from liability derives from the notion that certain people should not be subject to suit because of their status or position.[63] Witnesses, in particular, are afforded immunity from suit regardless of their intentions because truthful testimony is essential "to the proper administration of justice"[64] and fear of a lawsuit may inhibit witnesses from telling the full truth.[65] Indeed, "the court's judgment is based on [witnesses'] testimony and they are given every encouragement to make a full disclosure to all pertinent information within their knowledge."[66] Thus, society's interest in maintaining a judicial system that rules on all relevant facts almost always outweighs individuals' interests in their reputations.

Conditional privileges, on the other hand, do not afford unlimited immunity to those accused of defamation.[67] Instead, these quali-

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58. *Id.* § 5.21, at 177.

59. *Id.*

60. *Id.* § 5.21, at 178.

61. *See, e.g.*, Odyniec v. Schneider, 322 Md. 520, 526-27, 588 A.2d 786, 789 (1991); Adams v. Peck, 288 Md. 1, 3, 415 A.2d 292, 293 (1980).

62. *See* Kennedy v. Cannon, 229 Md. 92, 182 A.2d 54 (1962). In *Kennedy*, the defendant's attorney commented on the plaintiff's sexual behavior while explaining to a newspaper his client's strategy for an upcoming rape trial. *Id.* at 98, 182 A.2d at 55-56. The rape victim sued the attorney for defamation, and the Court of Appeals refused to grant the lawyer an absolute privilege. *Id.* at 99, 182 A.2d at 58. The court held that his immunity was limited to "communications such as those made between an attorney and his client, or in the examination of witnesses by counsel, or in statements made by counsel to the court or jury." *Id.* at 98, 182 A.2d at 58.

63. 2 HARPER ET AL., *supra* note 30, § 5.21, at 178.

64. McDermott v. Hughley, 317 Md. 12, 24, 561 A.2d 1038, 1044 (1989).

65. 2 HARPER ET AL., *supra* note 30, § 5.21, at 180.

66. *Id.* § 5.21, at 187. Even if witnesses tell the truth, they may fear liability because of the difficulty of proving the truth of their allegations. *Id.*

67. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 816 (5th ed. 1984) ("If it has relatively less weight from a social point of view, the immunity may be qualified, and conditioned upon good motives and reasonable behavior.").

fied privileges are lost if abused.[68] In particular, courts afford a unique type of qualified privilege to reports of statements made in governmental and judicial proceedings.[69] This fair report privilege is "'an exception to the common law rule that one who repeats or republishes a defamation uttered by another "adopts" it as his own.'"[70]

(1) Rationale of the Fair Report Privilege.—Two basic rationales underlie the fair report privilege. The "agency rationale" recognizes that busy citizens cannot attend all official and governmental proceedings and that, therefore, they must rely on the press to provide informative accounts of these proceedings.[71] In *Cox Broadcasting Corp. v. Cohn*,[72] the Supreme Court explained that "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."[73]

The second premise underlying the fair report privilege, the "supervisory rationale," recognizes that reporters often provide members of the public their only avenue of overseeing the operations of government officials and ensuring that public servants promote the public's welfare.[74] As then Judge Oliver Wendell Holmes stated in *Cowley v. Pulsifer*,[75] the fair report privilege exists "because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to

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68. Miner v. Novotny, 304 Md. 164, 167, 498 A.2d 269, 270 (1985); *see* KEETON ET AL., *supra* note 67, § 114, at 816 (explaining that "[t]he defendant's belief in the truth of what he says, the purpose for which he says it, and the manner of publication" affect whether the defendant's comments will be actionable).

69. KEETON ET AL., *supra* note 67, § 115, at 836.

70. Helinski v. Rosenberg, 90 Md. App. 158, 164-65, 600 A.2d 882, 885 (quoting Dameron v. Washington Magazine, Inc., 779 F.2d 736, 739 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986)), *rev'd*, 328 Md. 664, 616 A.2d 866 (1992), *cert. denied*, 113 S. Ct. 3041 (1993); *see also* Reuber v. Food Chem. News, Inc., 925 F.2d 703, 712 (4th Cir.) (*en banc*), *cert. denied*, 111 S. Ct. 2814 (1991) (asserting the need for this exception "because of the open relationship we seek to share with our own government"); Medico v. Time, Inc., 643 F.2d 134, 137 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981) (noting the "chilling effect" of the republication rule on the freedom of the press).

71. *Reuber*, 925 F.2d at 713; *see* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."); *see also* DAVID A. ELDER, THE FAIR REPORT PRIVILEGE § 1, at 3 (1988).

72. 420 U.S. 469 (1975).

73. *Id.* at 492.

74. ELDER, *supra* note 71, § 1, at 3; *see also Reuber*, 925 F.2d at 713.

75. 137 Mass. 392 (1884).

satisfy himself with his own eyes as to the mode in which a public duty is performed."[76]

(2) Conditions of the Fair Report Privilege.—While Maryland courts have consistently recognized society's strong interest in receiving comprehensive accounts of government proceedings, they have recognized the fair report privilege only when three conditions were met. First, although the *Restatement (Second) of Torts* disregards the defamer's intent,[77] Maryland courts have held that reporters cannot repeat derogatory comments made with constitutional malice[78] or an intention to harm another.[79] Second, the qualified privilege is destroyed if the reporter renders an inaccurate account.[80] In *McBee v. Fulton*,[81] the Court of Appeals explained that "[t]he reports, though they need not be *verbatim*, must be substantially correct and not garbled or partial" in order to sustain the qualified fair report privilege.[82] Finally, the repeated comments must be "fair, *bona fide* and impartial."[83] Although Maryland courts have not elucidated the fairness standard since *McBee*, the *Restatement (Second) of Torts* states, and federal courts in Maryland have agreed, that reports are unfair if they delete or distort important material in an effort to mislead the public.[84]

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76. *Id.* at 394. A third "information rationale" has also been advanced as support for the fair report privilege, but it is more logically subsumed within the other two rationales because both the agency and supervisory rationales depend on a need for information. *See* ELDER, *supra* note 71, § 1, at 3-4 (explaining that because the public's ability to supervise the government depends on its access to information, courts often view the supervisory and information rationales as intertwined).

77. The *Restatement* states that "the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false." RESTATEMENT (SECOND) OF TORTS § 611, cmt. a (1977).

78. *See, e.g.*, Batson v. Shiflett, 325 Md. 684, 733, 602 A.2d 1191, 1215 (1992); Marchesi v. Franchino, 283 Md. 131, 138, 387 A.2d 1129, 1133 (1978).

79. *See, e.g.*, Evening News Co. v. Bowie, 154 Md. 604, 611, 141 A. 416, 419 (1928) (implying that the fair report privilege is lost if the plaintiff is "moved by any hostility, hatred, or ill will toward the [plaintiff] in publishing the news item complained of"); McBee v. Fulton, 47 Md. 403, 427 (1878) (holding that a defendant who acted with "express malice or ill-will to the plaintiff" could not claim the fair report privilege).

80. *McBee*, 47 Md. at 426.

81. 47 Md. 403 (1878).

82. *Id.* at 426; *see also Evening News Co.*, 154 Md. at 611, 141 A. at 419.

83. *McBee*, 47 Md. at 417.

84. The *Restatement* explains that:

> Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it.

Maryland courts have never articulated an additional restriction of the fair report privilege for persons who, like Dr. Rosenberg, repeat their own defamatory comments beyond the privileged forum. The *Restatement (Second) of Torts*, however, contains a "self-reported statement exception" to the fair report privilege, which provides that "[a] person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he . . . stated."[85] Before 1992, Maryland courts had never addressed this *Restatement* commentary, but commentators and most state courts that have considered this language have refused to adopt a literal interpretation. Instead, they have asserted that the self-reported statement exception is directed at individuals who intentionally initiate judicial proceedings for the purpose of obtaining immunity to defame others outside the privileged forum.[86]

3. The Court's Reasoning.—In *Helinski*, the Court of Appeals held that witnesses in judicial proceedings possess a narrow privilege to report their in-court testimony outside court.[87] Writing for the court, Chief Judge Murphy first concluded that Dr. Rosenberg's statements to the WJZ reporter were defamatory because they accused Helinski of child molestation, "an act reviled by society, which also constitutes a felony."[88] The court also assumed, for purposes of summary judgment,[89] that the doctor's comments to the reporter were false, unpro-

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RESTATEMENT (SECOND) OF TORTS § 611, cmt f. (1977); *see also* Pulvermann v. A.S. Abell Co., 228 F.2d 797, 803 (4th Cir. 1956) (holding that the defendants did not exhibit malice by not publishing the exact language of General Eisenhower's speech, since "[t]he variance . . . [was] such as might reasonably be expected in abbreviation"); Seymour v. A.S. Abell Co., 557 F. Supp. 951, 956 (D. Md. 1983) (relying on the *Restatement (Second) of Torts* definition of "fairness").

85. RESTATEMENT (SECOND) OF TORTS § 611, cmt. c (1977).

86. *See* 2 HARPER ET AL., *supra* note 30, § 5.24, at 207-08 ("[T]he privilege [should not] be recognized for the reporting of statements that were made in spurious circumstances, devised primarily to provide a pretext for the claim of the privilege."); *see also* Green Acres Trust v. London, 688 P.2d 617, 626 (Ariz. 1984) ("The privilege does not sanction self-serving re-publication."); Stover v. Journal Pub. Co., 731 P.2d 1335, 1339 (N.M. Ct. App. 1985), *cert. denied*, 484 U.S. 897 (1987) (explaining that the self-reported comment exception is aimed toward those who instigate lawsuits in order to obtain immunity to repeat defamatory in-court testimony outside of the courtroom); Williams v. Williams, 246 N.E.2d 333, 337 (N.Y. 1969) (concluding that the state's statutory fair report privilege was not intended to protect those who "maliciously institute a judicial proceeding alleging . . . defamatory charges, and then . . . circulate a [report] . . . based thereon").

87. *Helinski*, 328 Md. at 675, 616 A.2d at 871. The court declined to address whether Helinski was a public figure or whether the alleged abuse of his daughter constituted a public concern. *Id.*

88. *Id.*

89. Summary judgment requires that the reviewing court "consider whether or not a factual issue exists, and in so doing . . . resolve all inferences against the party making the

fessionally formulated, negligently communicated, and injurious to Helinski.[90] The court, nevertheless, dismissed the action against Dr. Rosenberg, finding that he possessed the fair report privilege, which afforded him a legal privilege to defame.[91] The court pointed out, however, that in contrast to Dr. Rosenberg's in-court testimony, which was absolutely privileged, the doctor's statements outside the courtroom were subject merely to a qualified privilege immunizing him from suit.[92]

The court advanced three reasons for extending the fair report privilege to Rosenberg. First, the court found that by repeating his testimony to the media, the doctor fulfilled a needed role in society by acting as an agent for members of the public who could not attend the hearing.[93] Second, even though only journalists traditionally have invoked the fair report privilege as a defense, the court recognized that neither Maryland authority, federal cases, nor the *Restatement* has limited the fair report privilege to the media and found that the privilege should be extended to witnesses in judicial proceedings.[94] Specifically, the court determined that Supreme Court as well as Maryland courts require treating media and nonmedia persons alike.[95] Finally, the court refused to read the *Restatement*'s self-reported statement exception[96] literally as preventing persons who have given privileged testimony from repeating their comments beyond the original forum.[97] In accord with the weight of authority regarding this commentary, the court found that it was directed to persons who deliberately instigate lawsuits to gain legal immunity to defame others.[98] Moreover, the court noted that it would be illogical to ex-

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motion." McDermott v. Hughley, 317 Md. 12, 22, 561 A.2d 1038, 1043 (1989); Beard v. American Agency, 314 Md. 235, 246, 550 A.2d 677, 682 (1988).

90. *Helinski*, 328 Md. at 675, 616 A.2d at 871.

91. *Id.* at 674, 616 A.2d at 871.

92. *Id.* at 676-77, 616 A.2d at 872.

93. *Id.* at 680, 616 A.2d at 873. Acknowledging that the agency rationale applied to the facts, the court declined to comment upon whether the supervisory rationale applied as well. *Id.*; *see also supra* notes 71-76 and accompanying text (discussing these rationales).

94. *Helinski*, 328 Md. at 680, 616 A.2d at 874.

95. *Id.*; *see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773 (1985) (White, J., concurring) (explaining that the "First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech"); *id.* at 784 (Brennan, J., dissenting) (writing that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities"); Negley v. Farrow, 60 Md. 158, 177 (1883) (concluding that "the liberty of the press guaranteed by the Constitution is a right belonging to every one [sic]").

96. RESTATEMENT (SECOND) OF TORTS § 611 cmt. c (1977); *see supra* note 85 and accompanying text (quoting the *Restatement*).

97. *Helinski*, 328 Md. at 686, 616 A.2d at 877.

98. *Id.* at 684-86, 616 A.2d at 876-77.

tend the fair report privilege to any attendee of the proceeding, but to deny it to a witness.[99]

After establishing that Dr. Rosenberg could invoke the fair report privilege, the court assessed whether he acted to preserve his immunity from liability. The court set out both Maryland's view—that actual malice can defeat the fair report privilege, and the *Restatement*'s view—that the intent of the reporter is irrelevant so long as the report is "fair and substantially correct," and concluded that Dr. Rosenberg's report qualified under both.[100] The court first noted that no evidence indicated that Dr. Rosenberg acted with actual malice.[101] Instead, the court found that Dr. Rosenberg honestly believed the truth of his in-court testimony.[102] Moreover, the Court of Appeals found that the trial court's July 26th refusal to link Helinski to his child's sexual injury did not make the doctor's professional opinion false.[103] Rather, the trial court's acceptance of the doctor's testimony demonstrated that the issue of abuse was still open.[104]

The Court of Appeals also found that Dr. Rosenberg retained his immunity because his report met the requisite standards for accuracy and fairness.[105] Rosenberg's report was of his in-court testimony; it was accurate because he essentially repeated his in-court testimony to the television reporter.[106] In assessing the fairness of his report to the media, the court noted that Dr. Rosenberg was not required to comment on collateral matters[107] at the proceeding because his testimony constituted the most essential and relevant part of the hearing.[108] Thus, a more comprehensive account of the hearing would not have

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99. *Id.* at 686, 616 A.2d at 877.

100. *Id.* at 677-79, 616 A.2d at 871-73.

101. *Id.* at 678, 616 A.2d at 873.

102. *Id.* at 678-79, 616 A.2d at 873.

103. *Id.* at 679, 616 A.2d at 873.

104. *Id.*

105. *Id.* at 681-84, 616 A.2d at 874-76.

106. *See id.* at 680-81, 616 A.2d at 874. The court observed that Rosenberg had used similar verbiage and expressions on the witness stand. *Id.* at 681, 616 A.2d at 874. It added that, "[i]f anything, parts of his witness testimony were phrased somewhat more emphatically in connecting Helinski to sexual abuse of the child." *Id.*

107. Mr. Helinski argued that Dr. Rosenberg's report was unfair because it did not include references to the fact that the trial court found Mrs. Helinski in contempt, ordered psychological examinations for both parties, and originally considered Mr. Helinski innocent of the child abuse charges. *Id.* The court remarked that comments about the contempt of court finding and the order for psychological testing could have "multiplied the damage to Helinski's reputation." *Id.* at 682-83, 616 A.2d at 875. In addition, Rosenberg was not required to report that the court did not find Helinski innocent of child molestation because the issue was still pending before the court. *Id.* at 682, 616 A.2d at 875.

108. *Id.* at 682-83, 616 A.2d at 875.

conveyed a less defamatory message about Mr. Helinski to the public.[109]

4. Analysis.—

a. Persons Entitled to Invoke the Fair Report Privilege.—In *Helinski,* the Court of Appeals reaffirmed its commitment to the common law fair report privilege and clarified its parameters. Specifically, the court revisited the fair report privilege in the context of judicial proceedings. Not only did it formulate clearer standards for invoking this qualified immunity, but by adhering to common law principles, it implicitly adopted the Supreme Court's balancing of individuals' rights to receive redress for injuries and First Amendment concerns.

The *Helinski* court settled the question of who is entitled to claim the protection of the fair report privilege. Prior to *Helinski,* the court established that newspapers possess immunity to repeat defamatory comments,[110] but left open the question of whether nonmedia persons can invoke the fair report privilege. In *McBee,* the court stated that a qualified privilege extends to two kinds of reports: "newspaper and *other reports* of the proceedings of Courts of justice."[111] It did not, however, explain who might qualify as the authors of the second class of reports. By extending the fair report privilege in *Helinski* to witnesses who repeat their testimony outside the courtroom, the court explicitly ruled for the first time that nonmedia individuals may invoke the privilege in connection with their reports.[112]

The decision was by no means radical. Both the United States District Court for the District of Maryland[113] and the *Restatement*[114] have extended the fair report privilege beyond the media. In addition, the Supreme Court and the Court of Appeals both have held that media defendants do not have greater First Amendment rights than average citizens.[115] In addition, the rationale for granting immunity to reporters applies to individuals.[116] Like the media, individuals provide accounts of judicial proceedings as agents for the public, disseminating information necessary for citizens to participate in a de-

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109. *Id.*

110. *See* Evening News Co. v. Bowie, 154 Md. 604, 611, 141 A. 416, 419 (1928); McBee v. Fulton, 47 Md. 403, 427 (1878).

111. *McBee,* 47 Md. at 417.

112. *See Helinski,* 328 Md. at 680, 616 A.2d at 874.

113. *See* Seymour v. A.S. Abell Co., 557 F. Supp. 951 (D. Md. 1983).

114. *See* RESTATEMENT (SECOND) OF TORTS § 611 cmt. c (1977).

115. *See supra* note 95 and accompanying text.

116. *See supra* note 93 and accompanying text.

mocracy. Moreover, nonmedia actors serve as a conduit between the government and the public, allowing citizens to supervise official actions.

Finally, by granting witnesses in judicial proceedings conditional immunity to repeat their in-court testimony outside the courtroom, the *Helinski* decision reduced the likelihood that potential witnesses in future cases might hesitate to testify because of a fear of liability. Although Maryland courts already grant witnesses absolute immunity for their defamatory in-court testimony,[117] witnesses might be reluctant to take the stand if they fear possible liability for intentionally or inadvertently repeating their comments outside the courtroom. Thus, although the decision in *Helinski* did not hinge on the absolute privilege afforded in-court testimony, the holding furthered the goal of finding the truth in judicial proceedings by encouraging witnesses to reveal all relevant information.

The *Helinski* decision also clarified who may invoke the fair report privilege by discussing the relevance of the *Restatement*'s self-reported comment exception. Based on decisions in sister states and commentary from scholars, the court wisely held that this exception was aimed at those who set out to defame and avoid liability by manipulating the justice system.[118] As Judge Murphy stated, "to deny the privilege to a witness reporting his own testimony, while the privilege is available to any other court spectator later recounting that same testimony, would defy logic."[119] Thus, by explicitly stating its interpretation of the *Restatement* language, the court prevented future confusion regarding whether witnesses can repeat their testimony outside the courtroom.

b. Conditions of the Fair Report Privilege.—In *Helinski,* the court also clarified the fair and accurate standard required to maintain the fair report privilege. It did not elaborate on the accuracy requirement because it had already offered sufficient guidance on this point in *McBee* by stating that accounts need not be replicas of the original comments.[120] The court did, however, elucidate the meaning and relevance of the fairness requirement as it applies to repeated testimony. In essence, the court adopted the approach of the *Restatement*—that reporters may edit certain segments of the proceeding, but may not present the information in a misleading manner.[121]

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117. *See supra* notes 61-66 and accompanying text.
118. *See supra* notes 97-98 and accompanying text.
119. *Helinski,* 328 Md. at 686, 616 A.2d at 877.
120. *See supra* notes 81-83 and accompanying text.
121. *See supra* note 84 and accompanying text.

By adhering to the *McBee* definition of accuracy and adopting the *Restatement*'s definition of fairness, the court created a workable standard that balances the rights of individuals against the needs of society. Under *Helinski*, the interests of individuals in maintaining their reputations will be sufficiently protected under the fairness requirement because out-of-court reports must not stray from or misrepresent the original proceedings. At the same time, the flexibility the court upheld with regard to accuracy will make it more likely that the public will receive information. The court recognized that "the importance of educating the public promptly and succinctly about governmental action . . . demands a large measure of tolerance . . . ."[122]

The court left open the question of whether the intent of the reporter is relevant to the use of the fair report privilege. The court's failure to choose between the view of its prior case law and the more modern view of the *Restatement* indicated that it may not uphold the status quo in future cases.[123] In fact, the *Helinski* court may have abstained from judgment on this issue in an effort to await a case in which the facts warrant removal of the intent requirement safeguard.[124]

Moreover, consideration of the reporter's state of mind is inconsistent with the First Amendment and the purpose of the fair report privilege. In the *Restatement*, the American Law Institute excluded its original proposition that harmful intentions will defeat the reporter's immunity.[125] In addition, the drafters predicted that the Supreme Court would reject an intent requirement because it would not want to limit the public's access to information.[126] Courts afford reporters qualified immunity to promote the dissemination of information to

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122. BRUCE W. SANFORD, LIBEL AND PRIVACY § 10.3.1, at 387 (Supp. 1987). "'[N]ewspaper accounts of legislative or other official proceedings must be accorded some degree of liberality. When determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's precision.'" *Id.* at 387-88 (quoting Holy Spirit Ass'n for the Unification of World Christianity v. New York Times, 399 N.E.2d 1185, 1187 (N.Y. 1979)).

123. *See supra* notes 100-104 and accompanying text.

124. In the instant case, the court did not need to decide whether the intent of the reporter would destroy the reporter's immunity because there was no evidence that Dr. Rosenberg believed his testimony was false or acted with reckless disregard for the truth. *Helinski*, 328 Md. at 678-79, 616 A.2d at 873.

125. SANFORD, *supra* note 122, § 10.3.3, at 392. The *Restatement of Torts* provides that "accurate and fair reports . . . are protected by a privilege which is qualified only to the extent that protection is lost if the report is published solely for the purpose of defaming the other and not for the purpose of informing the public." RESTATEMENT OF TORTS § 611 cmt. a (1938).

126. *See* SANFORD, *supra* note 122, § 10.3.3, at 392; ELDREDGE, *supra* note 30, § 79, at 422. However, Eldredge argues that the concerns of the *Restatement (Second)* drafter's were un-

citizens, who depend on these reports to participate in and supervise the government.[127] As long as reports are fair and accurate in the sense that they do not distort or manipulate the original privileged statements, the privilege serves its purpose of informing the public. "The editor's belief in the truth or falsity of such statements should not matter; the point is that the statements were made."[128]

c. First Amendment Implications of the Fair Report Privilege.—The *Helinski* court's reaffirmation of the fair report privilege struck a balance between individuals' interests in maintaining their good names and the First Amendment guarantees afforded by the Constitution. Its refusal to grant absolute immunity for all defamatory accounts and the requirement that all reports be conveyed in a fair and accurate manner ensured that societal needs will not categorically be permitted to subordinate individuals' interests in protecting their reputations. Although common law courts did not directly consider constitutional guarantees in creating the fair report privilege, the immunity provided by the privilege reflects the Supreme Court's First Amendment jurisprudence by promoting the free flow of information in a democratic society. As the Court stated in *New York Times v. Sullivan*,[129] the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[130]

5. Conclusion.—In *Helinski*, the Court of Appeals broadened the scope of Maryland's fair report privilege. The court increased the applicability and usefulness of the privilege by extending conditional immunity to nonmedia defendants and clearly defining the standards necessary to invoke the protection. This general expansion of the privilege will maintain the balance between protecting the interests of individuals in their reputations and furthering the constitutional rights of all citizens to be informed about events that affect them.

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founded because there is no indication that the Supreme Court will grant immunity to a reporter who knew or suspected that the commentary was false. *Id.* § 79, at 422-26.

127. *See supra* notes 71-76 and accompanying text.

128. SANFORD, *supra* note 122, § 10.4.1, at 393; *see also* SOWLE, *supra* note 29, at 542 ("The public has a right to learn of reports of public, nongovernmental statements and proceedings relating to matters of public interest, regardless of the reporter's view of the soundness of the statement.").

129. 376 U.S. 254 (1964).

130. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

XIV. WORKERS' COMPENSATION

A. *"Mental-Mental" Claims Under the Maryland Workers' Compensation Act*

In *Belcher v. T. Rowe Price Foundation, Inc.*,[1] the Court of Appeals held that an employee's mental injuries are compensable under the Workers' Compensation Act,[2] even when the employee suffers no related physical injury.[3] The court reached its holding by importing the concept of "physical injury"[4] used in negligence law into the Maryland workers' compensation statutory definition of "accidental personal injury."[5] The court limited its holding by excluding mental injuries incapable of "objective determination"[6] and not the result of "an unexpected and unforeseen event that occurs suddenly or violently."[7] On a first reading, the *Belcher* court appears to have significantly expanded the meaning of accidental personal injury under the Act by making "mental-mental" claims[8] compensable. The court's two exceptions[9] to its holding, however, will provide courts an opportunity to

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1. 329 Md. 709, 621 A.2d 872 (1993).

2. MD. CODE ANN., LAB. & EMPL. §§ 9-101 to -1201 (1991).

3. *Belcher*, 329 Md. at 745, 621 A.2d at 890.

4. The "physical injury" standard in tort includes mental injuries "capable of objective determination." Vance v. Vance, 286 Md. 490, 500, 408 A.2d 728, 734 (1979) (finding evidence of a wife's emotional reaction to her husband's misrepresentation of his marital status at time of their marriage sufficient to establish physical injury).

5. *Belcher*, 329 Md. at 738, 621 A.2d at 886.

6. *Id.* at 745-46, 621 A.2d at 890.

7. *Id.* at 740, 621 A.2d at 887 (quoting Sparks v. Tulane Med. Ctr. Hosp. & Clinic, 546 So. 2d 138, 147 (La. 1989)).

8. Mental-mental claims are claims based on mental injuries not accompanied by physical manifestations. The initial impact of the injuring event on the claimant is purely mental (i.e. the event is *seen*, not physically felt) and the resulting injury is purely mental. Marc A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages in the Absence of Physical Injury*, 2 ANN. SURV. AM. L. 671, 672 n.9 (1990). An example of a mental-mental claim is a claim for the emotional distress that results from witnessing a particularly horrific accident in the work place. Mental-mental claims are also referred to by courts and commentators as "stress claims," "nervous injuries," and "emotional injuries." *See* ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 42.23, 42.25(a) (1991).

Mental-mental claims are distinguished from other types of claims involving mental injuries. Antonetti, *supra*, at 672 n.9. "Physical-mental" claims are claims for mental injuries that result from some physical impact on the body. *Id.* An example of a physical-mental injury is the fright and emotional shock resulting from a car accident in which one's body is struck. "Mental-physical" claims are claims for physical injuries that result from a purely mental or emotional impact. *Id.* An example of a mental-physical claim is a claim for a heart attack brought on by fright in a "near miss" of a car accident.

9. *See supra* notes 6-7 and accompanying text.

interpret *Belcher* narrowly, such that it will have little practical effect on Maryland's workers' compensation law.

1. The Case.—Carol Belcher worked as a secretary for T. Rowe Price in its downtown Baltimore office.[10] On April 11, 1991, a three-ton steel beam broke loose from a construction crane at work on a neighboring building and crashed through the roof into Belcher's office.[11] Though she was not touched by the falling beam, Belcher suffered severe emotional trauma as a result of the accident.[12] She endured "sleep disturbances, nightmares, heart palpitations, chest pain, and headaches."[13] She visited a psychiatrist twenty-two times;[14] the psychiatrist diagnosed her condition as Post Traumatic Stress Disorder and found that, as a result of the accident, she suffered a forty percent psychiatric disability.[15] No evidence was presented that Belcher received treatment for the physical effects of the incident.[16]

Belcher sought compensation for her injuries under the Workers' Compensation Act.[17] After her claim was denied by the Workers' Compensation Commission following a plenary hearing,[18] she appealed to the Circuit Court for Baltimore City and again was denied compensation.[19] She then appealed to the Court of Special Ap-

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10. *Belcher*, 329 Md. at 713, 621 A.2d at 874.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 714-15, 621 A.2d at 875.
16. *Id.* at 715, 621 A.2d at 875.
17. *Id.* at 712, 621 A.2d at 873. The Workers' Compensation Act gives covered employees injured by a third party a choice of proceeding against the employer under the Act, against the third party in tort, or against both the employer and the third party in tort if they are joint tortfeasors. MD. CODE ANN., LAB. & EMPL. § 9-901 (1991).
18. *Belcher*, 329 Md. at 712, 621 A.2d at 873. The Commission held a hearing on two issues: (1) whether Belcher sustained an accidental personal injury arising out of and in the course of employment; and (2) whether Belcher's disability was the result of such an accidental personal injury. *Id.* at 715, 621 A.2d at 875. The Commission found against Belcher on both questions. *Id.*
19. *Id.* at 712, 621 A.2d at 873-74. The Circuit Court judge defined the issue in the case as whether a purely mental condition is compensable under the Workers' Compensation Act when no physical injury is present. *Id.* at 715, 621 A.2d at 875. Relying on the Court of Special Appeals's decision in Le v. Federated Dep't Stores, Inc., 80 Md. App. 89, 560 A.2d 42 (1989), *aff'd on other grounds*, 324 Md. 71, 595 A.2d 1067 (1991), the judge denied compensation. In *Le*, an employee sought damages against an employer for false arrest, defamation, and intentional infliction of emotional distress. *Id.* at 90, 560 A.2d at 42. The Court of Special Appeals held that because the employee's claims did not involve physical or mental injury, they were outside the scope of the Workers' Compensation Act. *Id.* at 92-93, 560 A.2d at 43. This finding allowed the employee in *Le* to avoid the exclusivity provision of the Workers' Compensation Act and pursue an independent tort action against his employer. *Id.* at 93, 560 A.2d at 43; *see* MD. CODE ANN., LAB. & EMPL. § 9-509(b) (1991)

peals,[20] but the Court of Appeals intervened and sought review of the case on its own motion.[21]

2. Legal Background.—Workers' compensation statutes arose in Europe in the late nineteenth century in response to common law doctrines that allowed employers to escape liability in negligence for employees' work-related injuries.[22] As industrialization increased the number of injured workers and their dependents, society sought ways to prevent the economic destitution of families caused by a family member's debilitating injury at work.[23] In exchange for assured recovery for on-the-job injuries under workers' compensation statutes, workers relinquished their right to bring actions against employers in tort.[24] In 1902, Maryland created the Employers' and Employees' Cooperative Insurance Fund and became the first American jurisdiction to enact a workers' compensation statute.[25]

a. Accidental Personal Injury Under the Workers' Compensation Act.—The Workers' Compensation Act requires employers to provide compensation to any covered employee[26] who suffers an accidental personal injury.[27] Accidental personal injuries are of three types:

> (1) an accidental injury that arises out of and in the course of employment;
>
> (2) an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of the employment . . . ; or
>
> (3) a disease or infection that naturally results from an accidental injury that arises out of and in the course of employment . . . .[28]

("Except as otherwise provided . . . compensation provided under this title . . . is in place of any right of action against any person.").

20. *Belcher*, 329 Md. at 712, 621 A.2d at 874.

21. *Id.*

22. *See* RICHARD P. GILBERT, MARYLAND WORKERS' COMPENSATION HANDBOOK § 1.2 (1993); Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 36 CORNELL L.Q. 206 (1952). The common law doctrines of contributory negligence, assumption of risk, and fellow-servant made it difficult for employees to recover in negligence actions. GILBERT, *supra*, §§ 1.1-1 to -3.

23. *See* GILBERT, *supra* note 22, § 1.2.

24. *See* Antonetti, *supra* note 8, at 671.

25. GILBERT, *supra* note 22, § 1.2 (citing 1902 Md. Laws 139).

26. MD. CODE ANN., LAB. & EMPL. § 9-202(a) (1991). An employee is covered "while in the service of an employer under an express or implied contract . . . of hire." *Id.*

27. *Id.* § 9-501.

28. *Id.* § 9-101.

Maryland courts have long held mental-physical claims, that is, claims for mental distress that result in physiological injury,[29] compensable under the workers' compensation laws so long as the mental injury results in a substantial physical injury.[30] More recently, courts have granted recovery for mental injuries that result in a substantial physical *change* in the body.[31] Courts also have held physical-mental claims[32] compensable if the emotional trauma for which compensation is sought forms an "unbroken chain of proximate cause" with the initial physical injury.[33] Mental-mental claims,[34] however, had not been held compensable under the Act prior to the Court of Appeals's holding in *Belcher*.[35]

b. Mental Injury in Negligence Actions.—Early Maryland common law found tortfeasors liable for "all direct injur[ies] resulting from their wrongful act[s] . . . ,"[36] but barred recovery for "mere fright or mental suffering" that occurred apart from physical impact or injury.[37] Recovery was possible, however, for "material physical injury" that resulted from fright caused by a tortfeasor's act.[38]

Later case law expanded the availability of tort recovery for mental injuries. Plaintiffs could sustain a cause of action for damages for nervous shock without physical impact so long as that nervous con-

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29. *See supra* note 8.

30. *See* J. Norman Geipe, Inc. v. Collett, 172 Md. 165, 190 A. 836 (1937) (granting recovery for paralysis resulting from a cerebral hemorrhage caused by an employee truck driver's shock at running into a coworker). "[A]n accidental personal injury takes place if the injury be a nervous shock that produces not a mere emotional impulse but a physiological injury . . . ." *Id.* at 171, 190 A. at 836.

31. *See* Sargent v. Board of Educ. of Baltimore County, 49 Md. App. 577, 584, 433 A.2d 1209, 1213 (1981) (granting recovery for nervous shock caused by claustrophobia because the employee's "blackout" was a sufficient physiological change to make the mental injury compensable under the Act).

32. *See supra* note 8.

33. *See* Young v. Hartford Accident & Indem. Co., 303 Md. 182, 193, 492 A.2d 1270, 1275 (1985) (finding that emotional distress and a suicide attempt were proximately caused by a workplace assault and were therefore fully compensable under the Act). The *Young* decision suggests that to be compensable, physical-mental claims must involve a substantial physical injury and a resulting mental injury. *See id.* Mere physical *impact* without physical *injury* could not sustain a claim for compensation. *See* GILBERT, *supra* note 22, § 5.2 ("[T]he occurrence of [a physical] accident is never to be considered *prima facie* evidence of injury.").

34. *See supra* note 8.

35. *Belcher*, 329 Md. at 721, 621 A.2d at 878.

36. Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74, 81 (1883).

37. Philadelphia, B. & W. R. Co. v. Mitchell, 107 Md. 600, 607, 69 A. 422, 424 (1908).

38. Green v. Shoemaker, 111 Md. 69, 77, 73 A. 688, 691 (1909) (finding a jury question as to whether nervous prostration resulting from repeated exposure to rock blasting satisfies the requirement for "material physical injury").

dition resulted in some "clearly apparent and substantial physical injury, as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or *mental* state."[39] Subsequently, the "physical" element required for recovery was interpreted by courts to include simply any evidence of a mental injury "capable of objective determination."[40]

3. The Court's Reasoning.—In *Belcher,* the court held that employers are liable under the Workers' Compensation Act for mental injuries to their employees caused by accidents not involving physical injury.[41] The court expressly adopted the concept of "physical injury" used in tort law to define the term "accidental personal injury" in the Workers' Compensation Act.[42] The court limited its holding by excluding mental injuries incapable of "objective determination"[43] and mental injuries related merely to the "general conditions" of employment.[44] Rather, to be compensable, the court held that a mental injury must be "demonstrable"[45] and the result of "an unexpected and unforeseen event that occurs suddenly or violently."[46]

Writing for the majority, Judge Orth first found that in denying Belcher's claim, the trial court had relied on a mistaken reading of the Court of Special Appeals's decision in *Le v. Federated Department Stores.*[47] In *Le,* an employee sought to escape the exclusivity provision of the Workers' Compensation Act and pursue an independent tort action for false imprisonment, defamation, and intentional infliction of emotional distress.[48] The *Belcher* trial court read the *Le* opinion as holding that, because the tortious acts in question were not physical, they fell outside the scope of the Workers' Compensation Act.[49] The Court of Appeals, however, had affirmed *Le* on other grounds, finding that because the Workers' Compensation Act provided employees the

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39. Bowman v. Williams, 164 Md. 397, 404, 165 A. 182, 184 (1933) (emphasis added) (permitting recovery for a father's fright resulting from witnessing a truck accident threatening his two young sons). The *Bowman* court read *Shoemaker* and its progeny as permitting recovery for fright manifested by an "external condition" or "symptom." *Id.*

40. Vance v. Vance, 286 Md. 490, 500, 408 A.2d 728, 733-34 (1979). *Vance* expanded the rule in *Shoemaker* and *Bowman* by permitting recovery on a showing of mere physical evidence of a mental state. *Id.*

41. *Belcher,* 329 Md. at 738, 621 A.2d at 886.

42. *Id.*

43. *Id.* at 745-46, 621 A.2d at 890.

44. *Id.* at 739-40, 621 A.2d at 887.

45. *Id.* at 734, 738, 621 A.2d at 884, 886.

46. *Id.* at 740, 621 A.2d at 887.

47. 80 Md. App. 89, 560 A.2d 42 (1989); *see supra* note 19.

48. *Le,* 80 Md. App. at 90, 560 A.2d at 42.

49. *Belcher,* 329 Md. at 717, 621 A.2d at 876.

option to pursue actions in tort for intentional injuries,[50] it need not reach the question of whether purely mental injuries are compensable under the Act.[51] Consequently, the Court of Appeals in *Belcher* found that, after *Le*, "the status of [mental] trauma under the Act was left in limbo."[52]

The *Belcher* court next turned to the meaning of "accidental personal injury" in the Workers' Compensation Act.[53] Finding both the General Assembly's legislative intent and Maryland case law inconclusive on the question of whether the term "accidental personal injury" includes purely psychological injuries,[54] the court turned to the concept of "physical injury" in Maryland tort law.[55] It found that the concept of "physical injury" in tort actions had come to include emotional injuries "capable of objective determination."[56] The court held that though the meaning of personal injury in workers' compensation law had not developed along the expansive lines of the physical injury concept in tort law, "modern times" required the court to adopt the tort definition of physical injury for use in workers' compensation law.[57] The court wrote,

> The provisions of the Act do not prohibit it; expediency has not proved to be a deterrent; the advances in medical science make it feasible; logic supports it; the needs of society require it. We have come to appreciate that a mind may be injured as well as a body maimed.[58]

The court reasoned that because the Workers' Compensation Act was intended to prevent workers from becoming indigent and dependent on the State as a result of work-related injuries, workers should be compensated for any work-related debilitating injuries that society generally finds legitimate.[59] Noting that the inclusion of mental injuries in tort claims for physical injury indicated that society considered them legitimate, the court found no reason for them not to be in-

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50. Federated Dep't Stores, Inc. v. Le, 324 Md. 71, 80, 595 A.2d 1067, 1071 (1991) (quoting MD. ANN. CODE art. 101, § 44 (1989 & Cum. Supp. 1990)). "If injury . . . results from the deliberate intention of his employer . . . the employee . . . shall have the privilege either to take under this article or have cause of action against such employer, as if this article had not been passed." *Id.*

51. *Id.*

52. *Belcher*, 329 Md. at 719, 621 A.2d at 877.

53. *Id.*

54. *Id.* at 722, 621 A.2d at 878.

55. *Id.*

56. *Id.* at 734, 621 A.2d at 884.

57. *Id.* at 738, 621 A.2d at 886.

58. *Id.*

59. *Id.* at 737-38, 621 A.2d at 886.

cluded within the definition of accidental personal injury in the Workers' Compensation Act.[60] The court remanded the case to the Workers' Compensation Commission with direction to conduct a hearing pursuant to its finding that mental injuries without accompanying physical harm are compensable under the Act.[61]

Judge Rodowsky, joined by Judges McAuliffe and Chasanow, concurred in the court's judgment, but wrote separately to argue that the majority's rationale was "so expansive as to be legally incorrect."[62] The concurrence argued that the evidence in Belcher's case created a factual question as to whether her injury satisfied the requirement under the Workers' Compensation Act that any psychological injury be accompanied by physiological change.[63] Rather than presenting a mental-mental claim, the concurrence argued that Belcher's physical reactions to the event (i.e., involuntary shaking, chest and shoulder pain, headaches, panic attacks, sleeplessness, and nightmares) suggested that her claim was of the type already compensable under the Act.[64] Furthermore, the concurrence found evidence in the recodification of the Maryland Workers' Compensation Act that the legislature intended mental-mental claims not to be compensable.[65] Finally, the concurrence argued that because the expansion of the Act to cover mental-mental claims may significantly impact the cost of workers' compensation to businesses and the Maryland economy in general, the majority's holding was inappropriate given that the question

60. *Id.* at 738, 621 A.2d at 886.

61. *Id.* at 746, 621 A.2d at 890.

62. *Id.* (Rodowsky, J., concurring).

63. *Id.* at 748, 621 A.2d at 891 (Rodowsky, J., concurring).

64. *Id.* (Rodowsky, J., concurring).

65. *Id.* at 750-51, 621 A.2d at 892-93 (Rodowsky, J., concurring). The original recodification of the Act introduced as House Bill 1 on January 9, 1991, used the term "accidental injury" rather than "accidental personal injury." *Id.* at 750, 621 A.2d at 892 (Rodowsky, J., concurring). In response to a letter from the chair of the Workers' Compensation Committee of the Maryland Chamber of Commerce opposing this change, the General Assembly submitted amendments to the bill that resulted in use of the term "accidental personal injury." *Id.* at 751, 621 A.2d at 893 (Rodowsky, J., concurring). The Committee had argued that use of the term "accidental injury" would create a "potential problem . . . if the Maryland Court of Appeals were to interpret the term 'accidental injury' to include other than physical injuries." Brief of Amici Curiae at app. 1 (citing Letter from Rudolph L. Rose, Chairman, Workers' Compensation Committee, Maryland Chamber of Commerce, to the Honorable Casper R. Taylor, Jr., Delegate, Maryland General Assembly 2 (Jan. 16, 1991)). The concurrence argued that the General Assembly's introduction of amendments to the original recodification demonstrated an intent to "prevent a judicial interpretation of 'accidental injury' that included 'other than physical injuries.'" *Belcher*, 329 Md. at 752, 621 A.2d at 894 (Rodowsky, J., concurring).

of the compensability of mental-mental claims was not clearly before the court.[66]

4. Analysis.—In *Belcher*, the Court of Appeals held that claims for mental injury without physical injury are compensable under the Workers' Compensation Act,[67] but limited its holding to mental injuries that are objectively demonstrable[68] and not merely the result of the general conditions of employment.[69] These two limitations will allow courts to read *Belcher* narrowly as permitting recovery for mental injuries only if they are accidental and are accompanied by physiological change in the body. Moreover, the General Assembly may respond to the *Belcher* holding by clarifying the language of the Workers' Compensation Act to expressly exclude mental-mental injuries.

a. Objective Demonstration.—As an answer to the "very real problem" that mental injuries may be easily faked, the court adopted the position that mental injuries will be compensable only if they are capable of objective determination.[70] The court maintained that a mental injury is objectively demonstrable if the "cause and *effect of psychological harm* are established"[71] and endorsed the view that no valid line can be drawn between mental and physical injuries.[72] The court was silent, however, as to what effect of psychological harm, *other than a physical effect*, could possibly satisfy the objective demonstration standard. Given the court's insistence that the human mind and body are of one piece,[73] its call for objective demonstration may cause courts to continue to require a showing of physiological change before granting recovery for mental injuries under the Workers' Compensation Act.[74] Since mental injuries that result in physiological change are already compensable under the Act,[75] courts may determine that *Belcher* did not in fact create a new category of compensable injuries.

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66. *Belcher*, 329 Md. at 754, 621 A.2d at 894-95 (Rodowsky, J., concurring).

67. *Id.* at 738, 621 A.2d at 886.

68. *Id.* at 745-46, 621 A.2d at 890.

69. *Id.* at 739-40, 621 A.2d at 887.

70. *Id.* at 745-46, 621 A.2d at 890.

71. *Id.* at 734, 621 A.2d at 884 (emphasis added).

72. *Id.* at 739, 621 A.2d at 887 ("'[T]here is no really valid distinction between physical and "nervous" injury.'") (quoting favorably LARSON, *supra* note 8, § 42.23, at 7-906).

73. *See id.* at 738, 621 A.2d at 887.

74. The concurrence in *Belcher* noted an analogous point. Citing Belcher's involuntary shaking, chest and shoulder pain, headaches, panic attacks, sleeplessness, and nightmares, the concurrence argued that Belcher's claim presented a factual question as to whether she suffered a physiological injury as a result of the accident. *Id.* at 748, 621 A.2d at 891.

75. *See supra* notes 29-33 and accompanying text.

b. General Conditions of Employment.—The *Belcher* court also held that mental injuries related to the "general conditions of employment,"[76] and therefore not caused by sudden, unforeseen events, are not compensable under the Workers' Compensation Act.[77] Presumably, the court adopted this rule to limit workers' compensation claims for mental stress resulting from ordinary job pressures or the work environment. The majority of courts that have adopted rules relating to mental-mental workers' compensation claims, however, have not adopted a sudden event requirement.[78] While such a requirement may help limit the number of claims, its logic relative to the existing Maryland statute and to the majority's focus on the aims of worker's compensation law is unclear.

Prior to *Belcher,* injuries were compensable under the Workers' Compensation Act regardless of whether they were precipitated by a sudden event or a gradual stimulus, provided they met the "accidental" test of the Maryland statute.[79] Consequently, claims related to the general conditions of employment—whether for mental or physical injuries—would likely not be covered because they did not result from some accident or unusual condition of employment.[80] Moreover, the court's adoption of the sudden event requirement conflicts with the general principle that all legitimate work-related injuries should be recoverable if they are accidental.[81]

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76. The court did not define "general conditions of employment." *See Belcher,* 329 Md. at 739, 621 A.2d at 887. However, this phrase, which the court borrowed from Sparks v. Tulane Med. Ctr. Hosp. & Clinic, 546 So. 2d 138 (La. 1989), was elaborated upon by the *Sparks* court:

> While the sudden onset of physical injury may qualify as the compensable "accident" in some cases . . . an employee's subjective assertion that he had a sudden onset of symptoms of mental injury, such as depression or anxiety, is not alone sufficient to show that an accident occurred. The employee must be able to point to a discernible employment-related event which caused the mental injury, an event separate and apart from the onset of the symptoms of that mental injury.

Id. at 147 n.7. The most commonly alleged workers' compensation claims for mental injury are those related to job pressures or harassment. *See* LARSON, *supra* note 8, § 42.25(a), at 7-958. Typical mental stress claims are "characterized by absence of physical injury, little time off work, low medical treatment costs, [and] insignificant retraining costs . . . ." *Id.*

77. *Belcher,* 329 Md. at 739-40, 621 A.2d at 887.

78. LARSON, *supra* note 8, § 42.23(b) n.1.

79. *See* Foble v. Knefely, 176 Md. 474, 6 A.2d 48 (1939) (holding a seamstress's injury caused by a faulty adjustment of the knee press of a sewing machine compensable).

An injury is "accidental" if it results from "some *unusual* strain, exertion or condition in the employment." Sargent v. Board of Educ. of Baltimore County, 49 Md. App. 577, 580-81, 433 A.2d 1209, 1211 (1981) (quoting Stancliff v. H.B. Davis Co., 208 Md. 191, 198, 117 A.2d 577, 591 (1955)).

80. *Sargent,* 49 Md. App. at 580-81, 433 A.2d at 1211 (citing Stancliff v. H.B. Davis Co., 208 Md. 191, 198, 117 A.2d 577, 591 (1955)).

81. *See Belcher,* 329 Md. at 737, 621 A.2d at 886.

c. The Legislature's Role in Workers' Compensation.—In *Belcher*, the court imported the concept of "physical injury" from negligence law into the definition of "accidental personal injury" under the Workers' Compensation Act.[82] With the court's decision to allow recovery for mental-mental claims, Maryland joined the trend in a majority of states.[83] However, of the twenty-eight states that allow some recovery for mental-mental claims as part of their workers' compensation schemes, only six have statutory language similar to that in the Maryland Act.[84] Moreover, only four of the ten states that use statutory language similar to that in the Maryland Act prohibit recovery for mental-mental claims in all circumstances.[85] In sum, courts of states with statutory language similar to Maryland's are rather evenly split as to whether mental-mental injuries are compensable: six states permit some recovery;[86] four states prohibit it entirely.[87]

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82. *Id.* at 738, 621 A.2d at 886.

83. *See* LARSON, *supra* note 8, § 42.23, at 7-876.

84. *See id.* § 42.23; Antonetti, *supra* note 8, at 675 n.33. Definitions of "injury" in state workers' compensation statutes are of four types: (1) injury as relating to "the physical structure of the body," (2) injury involving "any harmful change in the human organism," (3) injury that expressly includes mental injury under limited circumstances, and (4) injury described imprecisely such as in statutes that define it as "accidental injury arising out of and in the course of employment." *Id.* at 674-76. The Maryland Workers' Compensation statute is of the final type. *See* MD. CODE ANN., LAB. & EMPL. § 9-101 (1991).

Ten states have statutes similar to the Maryland Act. These states are Arkansas (ARK. CODE ANN. § 11-9-102 (Michie 1987)); Georgia (GA. CODE ANN. § 34-9-1(4) (Michie 1992 & Supp. 1993)); Illinois (ILL. ANN. STAT. ch. 48, para. 138.2 (Smith-Hurd 1986)); Indiana (IND. CODE ANN. § 22-3-6-1(e) (Burns 1992 & Supp. 1993)); Minnesota (MINN. STAT. ANN. § 176.011(16) (West 1993)); New Jersey (N.J. STAT. ANN. § 34:15-1 (West 1988)); New York (N.Y. WORK. COMP. LAW § 2(7) (McKinney 1992)); Oklahoma (OK. STAT. ANN. tit. 85, § 3(7) (West 1992 & Supp. 1994)); South Dakota (S.D. CODIFIED LAWS ANN. § 62-1-1(7) (1993)); and Tennessee (TENN. CODE ANN. § 50-6-102(5) (1992 & Supp. 1992)).

Of these states, Arkansas, Illinois, Indiana, New Jersey, New York, and Tennessee permit recovery for mental-mental injuries. *See infra* note 86.

85. The four states that prohibit recovery are Minnesota, Oklahoma, South Dakota, and Georgia. *See infra* note 87.

86. *See* Owens v. National Health Labs., Inc., 648 S.W.2d 829, 830 (Ark. Ct. App. 1983) (holding that "[there is] no reason why harm to the body of a worker should be limited to visible physical injury to the bones and muscles and should exclude work related trauma which results in an injury of the mind"); Board of Educ. of Chicago v. Industrial Comm'n, 538 N.E.2d 830, 833 (Ill. App. Ct. 1989) (holding claims for mental distress compensable if they arise from an "uncommon or unusual stress situation" when "viewed objectively"); Hansen v. Von Duprin, Inc., 507 N.E.2d 573, 576 (Ind. 1987) (holding that "whether the injury is mental or physical, the determinative standard should be . . . whether the injury arose out of and in the course of employment"); Simon v. R.H.H. Steel Laundry, 95 A.2d 446, 450 (N.J. 1953) (stating that there is nothing in the law that excludes compensation for "psychic trauma" without physical injury); Wolfe v. Sibley, Lindsay & Curr Co., 330 N.E.2d 603, 606 (N.Y. 1975) (holding that "psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury "); Jose v. Equifax, Inc., 556 S.W.2d 82, 84 (Tenn. 1977) (holding that "mental stimulus, such as fright, shock

States that prohibit compensation for mental-mental claims under statutes with language comparable to the Maryland Act do so out of deference to the policy-making role of the legislature. For example, in *Lockwood v. Independent School District No. 877*,[88] the Minnesota Supreme Court refrained from expanding the reach of a workers' compensation statute that covered only "injury arising out of and in the course of employment."[89] The court held that "the issue raised . . . involves a policy determination which . . . should be presented to the legislature as the appropriate policy-making body."[90]

The expansion of workers' compensation benefits has a far-reaching impact on a state's economy. For example, the California Workers' Compensation Institute (CWCI) recently reported that in California stress claims increased 540 percent between 1979 and 1988, even though the overall number of claims for disabling work injuries decreased by 8 percent.[91] CWCI estimated that stress claims may have cost the state as much as $383 million in 1987 alone.[92] Thus, any decision regarding the reach of a statute's compensation scheme would benefit from analysis of its impact on the state's business environment as a whole. State legislatures are in a better position to determine compensation categories because they are more sensitive to the economic and social pressures that should inform decisions about workers' compensation policy. Unlike the judiciary, which is guided only by the specific facts involved in the resolution of individual disputes, the legislature has access to and responsibility for broad-based data to inform its decisionmaking. It remains to be seen whether the Mary-

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or even excessive, unexpected anxiety could amount to an 'accident' sufficient to justify an award for a resulting mental or nervous disorder").

87. *See* W.W. Fowler Oil Co. v. Hamby, 385 S.E.2d 106, 107 (Ga. Ct. App. 1989) (holding that a "discernable physical occurrence" is required to support compensation for mental injuries); Lockwood v. Independent Sch. Dist. No. 877, 312 N.W.2d 924, 927 (Minn. 1981) (holding that in the absence of clear legislative intent to find mental injuries compensable, such claims are not covered by the Act); Fenwick v. Oklahoma State Penitentiary, 792 P.2d 60, 63 (Okla. 1990) (reiterating a long-held rule that mental disability not accompanied by a physical injury is not covered by workers' compensation); Lather v. Huron College, 413 N.W.2d 369, 371 (S.D. 1987) (holding that mental disability produced solely by mental stimuli is not compensable).

88. 312 N.W.2d 924 (Minn. 1981).

89. *Id.* at 926, 927 (citing MINN. STAT. § 176.011(16) (1980)).

90. *Id.* at 927.

91. Brief of Amici Curiae at app. 2. California is recognized as permitting liberal recovery for mental injuries, requiring neither "physical manifestation" nor "sudden event." *See* LARSON, *supra* note 8, § 43.25(a). The CWCI argues that the total number of stress claims may be three times as great as its initial report suggests. Brief of Amici Curiae at app. 2. This preliminary statistic suggests that the more moderate Maryland rule may nonetheless lead to a significant increase in mental-mental claims.

92. Brief of Amici Curiae at app. 2.

land General Assembly will respond to the court's decision by clarifying the statutory definition of "accidental personal injury," as have many state legislatures where judicial gloss has expanded recovery for mental-mental claims under Workers' Compensation.[93]

5. Conclusion.—In *Belcher v. T. Rowe Price*, the Court of Appeals held that mental injuries without accompanying physical injuries are compensable under the Workers' Compensation Act.[94] Given the court's two limits on its holding—that injuries must be capable of objective demonstration and not result from the general conditions of employment—it is unclear whether the decision actually departs from the court's prior rulings finding mental injuries that result in physiological change compensable under the Act.

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93. Antonetti, *supra* note 8, at 673.
94. *Belcher*, 329 Md. at 745, 621 A.2d at 890.